Petition

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CHICAGO JOURNEYMEN PLUMBERS' LOCAL UNION NO. 130, U.A.,

Petitioner,

v.

EDELL PLUMMER, HAYWARD ROSE, IVOR TAYLOR, JOSEPH EGGLESTON and ALBERTO VIERA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Court of Appeals incorrectly determined that a lesser standard of obedience to the Federal Rules of Civil Procedure should be required of plaintiffs in employment discrimination cases than would be required of other plaintiffs in otherwise similar circumstances.

2. Whether the Court of Appeals incorrectly determined that rules established by this Court in *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976), governing the imposition of sanctions for discovery abuse in civil proceedings, do not apply in alleged class action and discrimination cases.

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Petitioner, Chicago Journeymen Plumbers' Local Union No. 130, U.A., prays that a writ of certiorari issue to review the decision and order of the United States Court of Appeals for the Seventh Circuit reversing an order of the Federal District Court for the Northern District of Illinois imposing sanctions for discovery abuse under Rule 37, Federal Rules of Civil Procedure.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (App. B, *infra*) is reported at 657 F.2d

890. The order denying rehearing *en banc* (App. C, *infra*) is not reported.

The unreported memorandum and orders of the district court are set forth in App. D and E, *infra*.

JURISDICTION

The decision of the court of appeals was entered on August 11, 1981. Rehearing *en banc* was denied on October 7, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTES AND FEDERAL RULES INVOLVED

The statutory provisions involved are Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sections 2000e, *et seq.* and the Civil Rights Act of 1866, 42 U.S.C. Section 1981. Also involved are Rules 26(c), 30(d), 37(b)(2) and 37(d) of the Federal Rules of Civil Procedure. These Federal Rules are printed in App. A, *infra*.

STATEMENT OF THE CASE

A. The Nature And Significance Of The Issue

In this case, the court below has rejected sanctions that the district court imposed upon Respondents[1] for their "willful", "flagrant" and repeated violations of pre-trial discovery rules and a district court's orders, only because Respondents are plaintiffs in a civil action alleging employment discrimination. While it rejected these sanctions, the court below fully concurred with the district court's

[1] Two additional parties, the Plumbing Contractors Association of Chicago and Cook County and the Joint Apprenticeship Committee, JAC, have filed separate Petitions for Certiorari and do not appear on the caption of this Petition.

finding that all these plaintiffs and their counsel showed a "callous indifference to the rules of procedure" and that court's orders.[2]

The court below accepted without amendment the undisputed facts found by the district court that two of the plaintiffs, Eggelston and Viera, unilaterally refused to complete their depositions; all of the five plaintiffs refused to answer 965 deposition questions; all declared in advance of specific questions that they would not answer any questions in certain subject areas found to be relevant to class action issues by the district court; all engaged in a total of approximately 127 private conferences with their counsel during their oral examination, often after a question was asked and before answering or declining to respond; and none sought any protective orders to limit or curtail discovery (Plummer III at 3-8, 20, App. D-3-7, 17; Plummer V, 657 F.2d at 901-2, App. B-22-25).

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[2] Plummer I refers to the district court's published opinion in *Plummer* v. *Chicago Journeymen Plumbers' Local Union No. 130, U.A.*, 77 F.R.D. 399 (N.D. Ill. 1977) (limiting discovery to class issues).

Plummer II refers to the district court's published opinion in *Plummer* v. *Chicago Journeymen Plumbers' Local Union No. 130, U.A.*, 452 F. Supp. 1127 (N.D. Ill. 1978) (motions to dismiss granted in part and denied in part and motion for a more definite statement denied).

Plummer III refers to the district court's written Memorandum and Order of November 19, 1979, App. D (dismissing Plaintiffs Eggelston and Viera and entering a rule to show cause against remaining Plaintiffs Plummer, Rose, and Taylor).

Plummer IV refers to the district court's written Memorandum and Order of April 17, 1980, App. E (dismissing Plummer, Rose and Taylor).

Plummer V refers to the opinion of the August 11, 1981 decision of the court of appeals, 657 F.2d 890, App. B (reversing the district court).

In addition, the court below expressly recognized that the district court had carefully reviewed the entire record and had given sufficient warning to the plaintiffs that their repeated abuse of the discovery rules would result in severe consequences (Plummer V, 657 F.2d at 893, n. 5, 902, App. B-5, 25). After observing that "ordinarily" it would accept the district courts imposition of sanctions for such discovery abuse, the court below refused to penalize these plaintiffs because in "this discrimination case" the sanctions fell too heavily upon them, upon the putative class and upon the public if the discrimination charges had merit (Plummer V, 657 F.2d at 904, App. B-29).

This case raises the question, when a district court determines and the court of appeals agrees that plaintiffs and their counsel have engaged in a catalog of serious and sanctionable misconduct, whether the court of appeals may set aside the district court's selection of sanctions *not* because the charged acts did not occur, *not* because they were not serious and in breach of the federal rules, *not* because the district court's action was beyond its inherent power, *not* because of an absence of notice to plaintiffs, *not* because any other factors justified plaintiffs' misconduct, but *only* because the sanctions arose in a suit charging employment discrimination. This case thus presents the issue of whether a dual standard has arisen with respect to the application of the Federal Rules of Civil Procedure concerning discovery obligations and sanctions in cases alleging employment discrimination and whether the governing decision of this Court relating to such sanctions, *National Hockey League*, applies to cases arising under the Civil Rights Acts.

In view of the volume of cases arising under these statutes, as well as the need to clarify the scope of various of this Court's decisions which the lower court would exempt

from the reach of *National Hockey League*, this question has great significance both for litigants and the courts. Further, to the extent that other circuits have concluded, contrary to the court below, that such suits are not immune from a uniform enforcement of the Federal Rules, a conflict among the circuits has arisen which warrants this Court's attention.

B. The Facts As Found By The District Court And Adopted, Without Qualification, By The Court Of Appeals

Petitioners do not here argue for a particular version of the facts or advocate any particular interpretation of them. The following facts were found by the district court and were adopted or affirmed by the court of appeals. They are cited here to emphasize the risks involved in insulating any cases or litigants from the uniform application of the law.

On May 16, 1977, plaintiffs brought their complaint alleging that defendants practiced class-wide employment discrimination in the plumbing trade in violation of Title VII and Section 1981 (Plummer II, 452 F. Supp. at 1132). On December 19, 1977, the district court, over plaintiffs' opposition, limited initial discovery to matters relevant to determining whether or not the case should advance as a class action (Plummer I, 77 F.R.D. at 401-406).[3]

From the outset of this litigation, the district court informed the parties that discovery on matters relevant to the

[3] Discovery had begun in June, 1977, when plaintiffs served interrogatories on defendants. On July 22, 1977, the district court granted defendants' Motion to Limit Discovery to Class Issues and reaffirmed this order on November 11, 1977, expanding it to include depositions. (July 22, 1977, Tr. of Proceedings 4-6; November 11, 1977, Tr. of Proceedings 5-8 and 10-13.) Plaintiffs moved to expand the breath of permissible discovery beyond matters relevant to class issues and on December 19, 1977, the court reaffirmed its July and November orders concerning the scope of discovery.

resolution of class issues would play an important role in this case.[4] On April 21, 1978, the district court, while denying the defendants' motion for a more definite statement and observing that the complaint was "certainly not a paragon of clarity", said that "defendants can ascertain through discovery whether plaintiffs are adequate and typical [class] representatives" (Plummer II, 452 F. Supp. at 1144-1145). From the beginning of discovery, plaintiffs employed "obstructive tactics" and failed to heed the trial court's warnings (Plummer V, 657 F.2d at 902, App. B-24).

1. Two Plaintiffs Refused to Complete Their Depositions

Eggelston began his deposition on October 31, 1978. After refusing to answer more than 150 questions from defendant PCA and 45 consecutive questions asked by defendant Local Union No. 130 concerning his experience, skill or qualifications to work as a journeyman plumber, *i.e.*, his standing to represent such a class, he abruptly and unilaterally terminated his deposition (Plummer III at 4, 6 and 7, App. D-3-6; Eggelston Dep. 493-509).[5]

After terminating the deposition and before walking out, Eggelston's counsel said that only one of the three defendants, JAC, would be permitted to further depose Eggelston, and then only if it did so at a site other than that specified in the notice of deposition and if all questions were completed during the remainder of that business day, a period

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[4] It is beyond dispute that plaintiffs alleging class-wide injuries must demonstrate that they meet the requirements of Fed.R.Civ.P. 23. *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 431 U.S. 395, 405-406 (1977); *O'Shea* v. *Littleton*, 414 U.S. 488, 494 (1974); *Carracter* v. *Morgan*, 491 F.2d 458, 459 (4th Cir. 1973).

[5] The district court later found that defendants' questions were relevant to the issue of whether the case could proceed as a class action. (Plummer III at 13-18; App. D-11-14.) This finding was not in any regard questioned or disturbed by the reviewing court.

of less than two hours. JAC refused this "offer". (Plummer III at 18, App. D-15; Eggelston Dep. 507-509). Eggelston refused to return for further examination. Plaintiffs took no action pursuant to Fed.R.Civ.P. 26(c) or 30(d) to limit or terminate his examination (Plummer III at 7, App. D-6; Plummer V, 657 F.2d at 901-902, App. B-22-23), and he at all times thereafter refused to return.

Viera began his deposition on December 11, 1978. Even prior to beginning his deposition, plaintiffs' counsel frustrated defendants' attempt to depose Viera by refusing to inform them if an interpreter would be required. The district court found that the first day of deposition testimony given without an interpreter was "almost completely unintelligible" (Plummer III at 7, App. D-6).[6] After Viera's deposition was interrupted when he became ill, plaintiffs refused to permit him to return to complete his deposition. Plaintiffs thereby breached an express all-party stipulation that Viera would return to complete his deposition (Plummer III at 8, App. D-6, 7; Viera Dep. 304-305). Once again, plaintiffs did not seek any protective order to limit or to curtail examination[7] and refused to resume the deposition.

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[6] It was apparent at an early stage in his deposition that Viera required an interpreter. After five hours of unintelligible responses, plaintiffs' counsel agreed to suspend the deposition until the following day when an interpreter would be present. Earlier during the deposition, plaintiffs' counsel had refused to agree to any suspension of Viera's deposition (Viera Dep. 110-11, 91-94).

[7] On January 22, 1979, plaintiffs reiterated that Viera would not be produced to complete his deposition. Between February 12 and February 14, 1979, plaintiffs' counsel said that Viera might be produced to continue his deposition but only if defendants waived their right to depose another plaintiff, Taylor. Defendants refused to waive their right to depose each plaintiff and plaintiffs then refused to allow Viera to continue and to complete his deposition (Plummer III at 8, App. D-7).

By unilaterally terminating their depositions, plaintiffs denied petitioners any opportunity to examine Viera and foreclosed totally any examination of Eggelston by JAC.

2. Plaintiffs Refused To Answer Hundreds of Questions Relevant To the Resolution of Class Issues

The five plaintiffs, abetted by their counsel, refused to answer hundreds of questions involving matters which the trial court determined were relevant to resolve class issues. Plummer refused to answer 472 questions; Eggleston, 208 questions; Rose, 172 questions; Taylor, 71 questions; and Viera, 42 questions (Plummer III at 3-4, App. D-3, 4). The district court found that these questions involved subjects which were relevant to determine whether or not any class existed, whether the claims of plaintiffs were typical when compared to those of the putative class, and whether plaintiffs were adequate representatives of such class. The reviewing court did not question these findings.[8]

Moreover, all of the plaintiffs unequivocally and expressly refused in advance to answer questions on whole subject areas of inquiry, found by the district court, without dispute by the reviewing court, to be relevant to resolving class issues (Plummer III at 5, 13-18, App. D-11-14). These areas of inquiry included whether plaintiffs, themselves, or any alleged class member possessed the experience, skill or qualifications to work as journeymen plumbers, hence to represent a *class* of "journeymen" (Plummer Dep. 671-672, 504; Rose Dep. 493-494; Taylor Dep. 374, 511; Eggelston Dep. 419-420, 424-426), and whether plaintiffs were willing and able to pay litigation costs (Viera Dep. 303-304, Taylor Dep. 435-437, Eggelston Dep. 382).

[8] Virtually all of the questions asked by Local Union No. 130 were subjects of its Motion to Compel. The district court found that these questions were relevant to class issues.

The district court, commenting on plaintiffs' foreclosure of relevant discovery, said:

> "The decrease in the refusals to answer in the depositions of Rose, Taylor, and Viera was not due to a decrease in objectionable conduct by plaintiffs and plaintiffs' attorneys. It was due to defendants not asking questions which were earlier the subject of refusals to answer in the depositions of other plaintiffs and to defendants and plaintiffs entering into stipulations that plaintiffs would not answer questions in certain subject areas if the questions were asked." (Plummer III at 5, App. D-4).

3. Plaintiffs Engaged in Private Conferences During Their Depositions and Were Improperly Coached by Their Counsel

Plaintiffs and their counsel were engaged in approximately 127 off-the-record conferences during the course of their depositions, all out of the presence of defendants' counsel and the court reporter. Many of these private conferences occurred after a question from defendants and before plaintiffs answered or expressly declined to respond. On several occasions, plaintiffs retracted an answer given before the conference and substituted another.[9]

It would appear, therefore, that during these conferences, plaintiffs were coached by their counsel. The district court found this to represent "coaching" of witnesses and the court of appeals did not reject or question that description. In addition, plaintiffs' counsel interrupted plaintiffs' answers when they were beginning to reveal information detrimental to their cause. On these occasions, counsel announced that plaintiffs had "said enough" and would say

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[9] Plummer had 27 such conferences with his counsel; Eggelston, 8; Rose, 22; and Taylor, 69 (Plummer III at 5, App. D-4, 5).

no more (Plummer III at 5-7, App. D-4-5; Plummer V, 657 F.2d at 902, App. B-24; Plummer Dep. 54, 95, 130, 213, 258, 519, 536-7; Eggelston Dep. 78-81, 84; Rose Dep. 18, 43, 114). Similarly, when questioning was beginning to elicit responses which were contrary to plaintiffs' allegations and position, plaintiffs' counsel precluded further questioning by instructing plaintiffs to cease answering in areas where they had been responding. Thus, Plummer was permitted to answer questions concerning his qualifications to be a journeyman, until he testified that he lacked journeyman's qualifications. Thereupon, plaintiffs' counsel told Plummer not to answer further questions in this area, refusing to let him answer whether he believed that he had journeyman qualifications on the date that the complaint was filed (Plummer Dep. 149-150).

4. Plaintiffs Belatedly Attempted to Justify Their Abuse of the Discovery Rules

Plaintiffs attempted to excuse their misconduct when before the court of appeals by claiming that defendants asked harassing, racially offensive and repetitious questions. However, as that court correctly observed, of the 965 refusals to answer, "only a limited number"—approximately *seven* in all—were related to those questions which plaintiffs labeled as designed to harass (Plummer V, 657 F.2d at 901, App. B-22). Therefore, refusals to answer were based not upon the fact that the unanswered questions were offensive. Rather, these were non-racial questions held by the district court to involve areas relevant and proper for class inquiry.

Moreover, it is transparent that plaintiffs have only as an afterthought attempted to justify their own misconduct by claiming that defendants' questions were racially or otherwise offensive. As both the district court and the reviewing court recognized, plaintiffs did not complain to

the district court of offensive questions and did not at any time seek a protective order (Plummer IV at 10, 16, App. E-8, 13; Plummer V, 657 F.2d at 901-2, 904, App. B-22-24). Thus, plaintiffs did not object to defendants' questions on this ground during their depositions. Further, despite five appearances before the district court to discuss the progress of discovery (September 19, October 6, and November 13, 1978 and January 22 and February 16, 1979 Tr. of Proceedings), plaintiffs not only did not seek any protective order, but also at no time even complained about racially or otherwise offensive questions being addressed to them (Plummer V, 657 F.2d at 902, 904, App. B-22, 23, 29). Rather, without seeking a protective order, plaintiffs persisted in adamantly continuing to breach their discovery obligations, despite the district court's repeated orders that discovery proceed expeditiously and its frequent warnings that it would impose severe sanctions—including dismissal—against any party who failed to obey its orders (Tr. of Proceedings, April 21, 1978 at 6, May 22, 1978 at 6, September 19, 1978, October 6, 1978 at 7, January 22, 1979; Plummer IV at 6, App. E-5).

On April 23, 1979, after defendants filed motions to compel discovery and for sanctions, the district court once again warned the parties that their failure to resolve their discovery disputes would occasion the imposition of severe sanctions against the parties that it determined were at fault (Tr. of Proceedings, April 23, 1979, 3-5). Still, plaintiffs refused to produce Eggelston and Viera to complete their aborted depositions and refused to allow any plaintiff to answer any previously unanswered question.

While plaintiffs did not fully or timely present any complaints to the district court while discovery was progressing, the district court did have before it a full record of plaintiffs' complaints concerning defendants' conduct prior

to issuing its memorandum and order in response to defendants' discovery motions (Plummer III). On May 29, 1979 in its brief to the district court opposing defendants' motions to compel discovery and for sanctions, plaintiffs for the first time contended that their actions were permissible because defendants asked harassing, oppressive and purely legal questions (Plummer III at 11-18, App. D-9-15; Plaintiffs' Brief p. 5, 21-22).[10]

5. The District Court, After Reviewing the Record, Dismissed the Claims of All Plaintiffs for Their Flagrant Abuse of the Discovery Rules

In its memorandums and orders in response to defendants' discovery motions, the district court responded to plaintiffs' assertions, evaluated the defendants' questions, and concluded that plaintiffs' misconduct was not warranted because of any action by the defendants. The district court rejected plaintiffs' assertions that its answers to interrogatories foreclosed the necessity for oral examination and held that self-serving written answers by adverse parties who have been "evasive and non-responsive" during discovery do not foreclose defendants from a "fuller, deeper probing in depositions" (Plummer III at 12, App. D-10). The district court also observed that frequently answers given by the plaintiffs during their depositions—when plaintiffs answered at all—contradicted their "vague and

[10] Plaintiffs on appeal to the reviewing court cited 34 questions which they asserted were "purely legal questions that they could not possibly answer" (Plaintiffs' Brief, at 12). However, plaintiffs refused to answer only 4 of these questions during their depositions. Not one of the four refusals was based upon a claim that the question was harassing or "purely legal". Indeed, while plaintiffs refused to answer over 900 questions, only 7 of these refusals related to questions concerning race, national origin or citizenship (Eggelston Dep. 14-15; Plummer Dep. 167-169; and Rose Dep. 24-26; Rose later answered two of these seven questions. Rose Dep. 148).

conclusionary" written responses and/or responses given earlier in their depositions (Plummer III at 12, App. D-10).[11] Moreover, the district court expressly held that Local Union No. 130's questions did not duplicate those of PCA (Plummer III at 12-13, App. D-11).

After evaluating the record of pre-trial discovery, on November 19, 1979, the district court dismissed "the claims of Plaintiffs Eggelston and Viera . . . pursuant to Fed.R.Civ.P. 37(d)" for their "willful failure to make discovery" and "their flagrant violation of the discovery rules" and ordered the three remaining plaintiffs to show cause why they, too, should not have their claims dismissed because of their "evasive and thwarting conduct" and their "callous indifference" to the rules of discovery and of the court (Plummer III at 19-21, App. D-16, 17). Even after this ruling and order, the plaintiffs did not offer to respond to any of the hundreds of questions found by the district court to be relevant to class issues and did not produce Eggleston or Viera to complete their depositions.[12]

On April 17, 1980 the district court, weighing the entire record in the case and imposing the sanctions "necessary

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[11] For example, plaintiff Taylor, when questioned by PCA, stated that he knew of approximately 100 persons who applied for membership in Local Union No. 130. In later questioning by Local Union No. 130, Taylor could not in any way identify even two individuals who applied for membership in or were denied membership by defendants (Plummer III at 12, App. D-10; Taylor Dep. 169, 501-502, 509).

[12] In response to the Memorandum and Order of November 19, 1979 (Plummer III), Plaintiffs, on November 28, 1979, filed a "Motion To Have The Court Recuse Itself". (Plummer IV, at 18, App. E-14). Plaintiffs also declared that "Defendants' suggestion that Plaintiffs Plummer, Rose and Taylor be dismissed . . . cannot be taken seriously."

to impress upon the non-complying litigants and most particularly their attorneys, that the court will not tolerate dilatory tactics, gross professional negligence or fundamental obstinence[,]" dismissed the remaining three plaintiffs because they "have flouted their clear obligation to answer questions concerning the class issues in this case" (Plummer IV at 8, App. E-6, 7).[13]

6. The Court of Appeals, While Not Questioning the Findings of the District Court, Decided Sanctions Should Not Be Imposed Because Plaintiffs Had Brought A Civil Action Alleging Employment Discrimination

In reviewing the plaintiffs' appeal, the court of appeals recognized that the district court had reviewed the entire record before levying its sanctions and commended that court for its carefully reasoned memorandum opinions (Plummer V, 657 F.2 at 893, n. 5, App. B-5). Importantly, the reviewing court did not dispute or question any of the findings made by the district court concerning plaintiffs' discovery abuses. Rather, *the reviewing court itself* cited examples, found by the district court and fully supported by the record, as illustrative of plaintiffs' repeated disregard of the discovery rules (Plummer V, 657 F.2d at 901-902, App. B-22-25):

> (a) plaintiffs refused to answer 965 deposition questions, "with only a limited number of those refusals being related to the excesses" of which plaintiffs belatedly complained;
>
> (b) the wholesale practice of plaintiffs in refusing to answer many questions was unrelated to any claim of privilege;

[13] The court denied the recusal motion, finding that it was factually unfounded and legally insufficient (Plummer IV at 17-18, App. E-14, 15). The court of appeals also rejected plaintiffs' assertion that recusal was necessary (Plummer V, 657 F.2d at 893, n. 5, App. B-5).

(c) plaintiffs refused to answer such questions without taking the initiative to seek relief from the trial court under the applicable Federal Rules of Civil Procedure;

(d) plaintiffs and their counsel engaged in approximately 127 off-the-record conferences, many of which occurred while a question was pending;

(e) plaintiffs' counsel at times interrupted their clients' answers and instructed that enough had been said;

(f) plaintiffs' answers were at times evasive;

(g) plaintiffs' counsel at no time sought protection from the trial court as to questions that they later claimed were harassing and excessive; indeed, the court of appeals noted expressly:

> "The parties appeared before the trial judge on five occasions to report on the progress of class discovery, but plaintiffs' counsel did not move for a protective order or complain about the racial harassment now claimed on appeal." (Plummer V, 657 F.2d at 902, App. B-24).

(h) plaintiffs Viera and Eggelston unilaterally aborted their depositions and never completed them;

(i) plaintiffs' counsel evidenced little willingness to assist in the resolution of the discovery impasse, electing instead to charge the trial court with bias.

In addition to accepting without question these findings, the reviewing court concluded that plaintiffs' misconduct was not to be excused because they might have been unfamiliar with the practice concerning instructing witnesses to refuse to answer questions (Plummer V, 657 F.2d at 902, App. B-26).

Moreover, the reviewing court concluded that the district court made sufficient efforts to control discovery and gave sufficient warning to plaintiffs that their continued mis-

conduct would occasion the most severe consequences (Plummer V, 657 F.2d at 902, App. B-25).

On the facts in the record before it, the reviewing court observed that "ordinarily" it would accept the district court's imposition of "appropriate sanctions" (Plummer V, 657 F.2d at 904, App. B-29).[14] Nonetheless, the reviewing court refused to penalize these particular plaintiffs—though finding that they and their counsel repeatedly disdained their discovery obligations—because this was a class action raising claims of employment discrimination:

> "Ordinarily, we would condone the use of appropriate sanctions when attorneys forsake their professional responsibilities, but in this discrimination case the sanctions fall too heavily upon the individual plaintiffs who were not knowledgeable in the ways of the law, as well as on the other putative members of the class they seek to assist." (Plummer V, 657 F.2d at 904, App. B-29).

It is, therefore, apparent that the reviewing court would have upheld the trial court's dismissal of plaintiffs, but for the fact that plaintiffs have alleged employment discrimination. Moreover, once the court accepted its own premise that discrimination cases are unlike other areas of civil litigation when sanctions for discovery abuse are examined, and that plaintiffs in discrimination suits are to be treated with leniency even though they wilfully abused the discovery process, other serious decisional consequences followed, almost as a necessary corollary.

Thus, the court examined the record *de novo*, substituted its own judgment for that of the district court and gave far greater weight to defendants' conduct during discovery than did the trial court. Indeed, despite acknowledging that

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[14] The reviewing court did not state or imply that dismissal is an inappropriate sanction—in the ordinary case—for willful misconduct of the magnitude engaged in by the plaintiffs in this case.

defendants' conduct did not cause or justify plaintiffs' repeated disregard of the discovery rules, the court gave dispositive weight to this conduct and, unlike the district court, found that it warranted relieving the plaintiffs from any penalty for their "callous indifference" to the discovery rules.

The court below, therefore, did exactly what this Court had forbidden in *National Hockey League*. There, this Court foreclosed a reviewing court from substituting the exercise of its own discretion for that of a lower court, when the lower court had evaluated the full record, and held that sanctions for discovery abuse should be applied diligently and that lenity toward a party who has disregarded discovery responsibilities "cannot be allowed to wholly supplant other and equally necessary considerations embodied in (Rule 37)." 427 U.S. at 642. Since it must be presumed that the court below was aware of this Court's decision in *National Hockey League*, the decision below necessarily creates an exception to the application of *National Hockey League* in employment discrimination cases arising under Title VII.

REASONS FOR GRANTING THE WRIT

Introductory

The principal vice of the decision below is that the court has created a preferred group of plaintiffs and claims, which are freed from various of the duties imposed by the Federal Rules and this Court's decisions and are thereby insulated from the sanctions imposed upon others for a breach of those duties. And in creating this preferred class, the lower court has acted without reference to Congressional will as expressed either in the statutes or legislative debates; its decision is without reliance on the guidance of this Court; its opinion is without explanation of why the

issues presented in this case or the nature of these allegations or claimants warrant an exception engrafted upon Rules and decisions which themselves neither express nor imply any basis or intention for such an exception. Petitioners urge upon this Court that there exists a substantial risk that the integrity of our judicial system is in jeopardy if it varies the duty to honor uniform rules of procedure or substance depending upon the identity of the plaintiff or his asserted cause of action. The result of that practice in this instance is a dislocation in the law involving the duties of class representatives to respond to discovery, a new limitation on the inherent powers of judges reasonably to manage and control their cases, and an interpretation of *National Hockey League* which would limit its reach in a manner never suggested by this Court. These are today's dislocations. To permit the result below to stand is an invitation to other courts to carve out their own exceptions, to select their own preferred disadvantaged plaintiffs, to determine which plaintiffs may safely rely on the judgments of their counsel and which shall be held not to be free to do so, and to create their own tiers or standards both for counsel and for plaintiffs.

At a minimum, if plaintiffs in employment discrimination cases are to be accorded a special or preferred status as a presumed function of the operation of the Civil Rights laws, that result should be expressed by this Court, together with the limits of that preference.

The Decision Below Creates A Double Standard For Discovery And Discovery Sanctions, Insulates Discrimination Suits From The Reach Of The Discovery Rules, And Encourages Discovery Abuse

If the decision below is permitted to stand, the direct result in this case is to create a double standard or two-tier system for the conduct of discovery and discovery sanctions. The stringent sanctions which in other types of suits operate

to discourage discovery abuses will be effectively blunted in discrimination cases. Indeed, the decision below has engrafted that result as an exception to the operation of the federal rules as applied to plaintiffs in employment discrimination suits. Plaintiffs in discrimination suits and their counsel—only because they bring discrimination suits—who willfully and repeatedly disregard their discovery obligations, will escape the severe sanctions which would have been imposed on parties and attorneys in other civil actions for similar misconduct.

The result achieved by the decision below not only insulates discrimination cases only from the federal discovery rules, but, in addition, creates a series of consequences, each working a substantial alteration in traditional notions that the law applies equally to all and each warranting this Court's attention. These are matters which will exert a severe impact on the large number of discrimination cases regularly litigated in the courts.

The Decision Below Insulates Discrimination Suits From The Reach Of This Court's Decisions And Creates A Conflict Among The Circuits

Neither Congress nor this Court nor the courts of any other circuit have expressly or by implication stated or suggested that the discovery rules which elsewhere apply should be suspended for parties or their counsel in discrimination cases. Instead, *National Hockey League* v. *Metropolitan Hockey Club*, 427 U.S. 639 (1976), as endorsed by *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 763-4 (1980), suggests exactly the opposite. In *Roadway* this Court observed, "[a] court's processes may be as abused in a commercial case as in a civil rights action." In that case, this Court, following *National Hockey League*, held that sanctions for discovery abuse should be rigorously enforced.

In arriving at its decision, the court below has either confined *Roadway* narrowly to its facts,[15] or has simply ignored the holding and rationale of that decision. Consistent with the rationale of *Roadway* and *National Hockey League*, the courts in other circuits have upheld penalties imposed upon plaintiffs in discrimination cases without adopting a double standard in discovery sanctions. *E.g.*, *Van Nostrand* v. *University of Minnesota*, 26 E.P.D. para. 32,026 (8th Cir. 1981); *Jones* v. *Louisiana Bar Association*, 602 F.2d 94 (5th Cir. 1979). The decision below stands in conflict with these decisions, thus provoking a conflict among the circuits.

As a consequence of its conclusion that discrimination cases are not like other civil actions when discovery sanctions are reviewed, the court below also evolved a standard for review of discovery sanctions in discrimination cases that is not only not countenanced by *Roadway*, but also is specifically contrary to this Court's decision in *National Hockey League*. While the Court below did not distinguish, discuss, or even cite *National Hockey League*, the striking similarities between that case and the case at hand demonstrate that the decision below stands in contravention to the decision and rationale of that case.

In *National Hockey League*, the trial court had sanctioned the plaintiffs for their abuse of the discovery rules. The court of appeals did not challenge the trial court's findings concerning plaintiffs' disregard of the discovery process. Nonetheless, that court reviewed the record *de novo* and

[15] In *Roadway*, the complaint charged the employer with class-wide racial discrimination. The employer moved for attorneys' fees against plaintiffs' counsel because of counsel's dilatory conduct. The district court assessed these fees. The court of appeals held that attorneys' fees could not be assessed against counsel under 28 U.S.C. Section 1927 in discrimination cases because these fees could not be assessed under the statute in other types of actions. This Court affirmed.

found that certain "extenuating factors," given but little weight by the trial court, justified the plaintiffs' misconduct. As a result, the court concluded that no sanction was appropriate.

This Court reversed and concluded that the trial court's findings were adequately supported by the record. Accordingly, it was improper for the reviewing court to examine the record *de novo* and to accord more weight to the "extenuating factors" than did the trial court. While this Court did not question the validity of the reviewing court's additional findings concerning "extenuating factors," it did not permit that court to accord dispositive weight to those factors and thereby reject the penalty imposed by the trial court (427 U.S. at 641).

Unless discrimination suits are to be insulated from the decision and rationale of *National Hockey League*, the same conclusion is required here. As in *National Hockey League*, the district court's findings below were based on the entire record and were not questioned or amended by the reviewing court. Indeed, the court below endorsed the trial court's conclusion that plaintiffs and their counsel repeatedly abused the discovery rules. Nonetheless, like the court of appeals in *National Hockey League*, the court below considered the record *de novo* and accorded greater weight to certain factors, here defendants' conduct during discovery, than was accorded by the district court. Moreover, as in *National Hockey League*, the reviewing court relied upon its own evaluation of these factors to reverse the district court and to determine that no sanction was appropriate. Accordingly, the court below did precisely what this Court in *National Hockey League* held to be improper.

Under the holding of *National Hockey League*, where, as here, a district court's findings are acknowledged by the reviewing court to be supported by the entire record and are not contravened by that court, the district court's determination to dismiss the plaintiffs' claims cannot amount to

an abuse of discretion, unless discrimination suits are to be treated unlike other civil actions.

It is a matter of importance whether a circuit court of appeals correctly interprets *National Hockey League* or creates an exception to that doctrine which imposes an interpretation severely limiting the application of that doctrine. If, as would appear to be inherently correct and consistent with a rational judicial system, the same sanctions for discovery abuse are to be applied in all civil suits, including discrimination cases, and the standard for reviewing these sanctions is to be the same, then the court below erred and created a dichotomy inconsistent with this Court's teaching and this Court should grant the Writ and so state or remand for reconsideration in light of this Court's decisions in *National Hockey League* and *Roadway*.

The Decision Below Permits Class Representatives In Discrimination Cases To Avoid Their Discovery Obligations

As a result of the double standard of sanctions for discovery abuse which is occasioned by this decision, plaintiffs seeking to represent a class in discrimination cases will not be required to meet the high standard of cooperation which their counterparts in other areas of civil law must honor. *Dellums* v. *Powell*, 566 F.2d 231 (D.C. Cir. 1977). In *Dellums*, the court stated:

> "Failure of a representative plaintiff to respond to discovery . . . is a serious matter which ought to be discouraged by appropriate sanctions." 566 F.2d at 236.

Inasmuch as this Court in *Roadway*, a class action discrimination suit, cited *Dellums* with approval, it would appear that the rationale of *Dellums* should apply to parties who bring discrimination actions.[16]

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[16] *Dellums* involved a class action brought against a police chief by persons arrested during a demonstration.

However, following the decision below, plaintiffs in discrimination cases only, including those claiming representative status, may avoid sanctions for flagrant discovery abuse, which would be proper in other types of cases. Therefore, these plaintiffs, far from cooperating fully, may not be hesitant to narrowly and slowly submit relevant information during discovery, or flatly refuse to answer questions which they, themselves, perceive should not be answered and even unilaterally terminate their depositions. A logical consequence of the creation of the two-tier system of sanctions for discovery abuse is the emergence of a double standard of cooperation during discovery. This standard invites far less than full and complete cooperation during discovery only in discrimination cases.

Furthermore, the decision below has truncated, in discrimination cases only, the inherent power of district courts to levy sanctions in response to abusive litigation practices. A court's inherent power to manage its own affairs should not depend upon the nature of the action being heard or the identity of the parties. When bad faith is found in the conduct of the litigation, whether the court's processes are being abused in a commercial case or a discrimination case, the court should have the inherent power to dismiss the cause. *See, Roadway Express, Inc., supra.* The decision below stands in opposition to this position.

The Decision Below Has Created Artificial And Unwarranted Distinctions Based Upon The Identity Of The Parties And The Nature Of Their Claim

The court below, by declining to hold plaintiffs in discrimination cases to the same standards which apply to plaintiffs in other civil actions, has created, at the expense of defendants, an artificial and unwarranted distinction based on the identity of the plaintiff and the nature of his claim. Indeed, the court's rationale for excepting parties in

discrimination suits from the normal operation of the discovery rules does not withstand analysis.

The court suggests that the application of recognized discovery standards and sanctions to discrimination suits would impose a burden on the plaintiff in such cases and on the public, as well, because it could result in the foreclosure of a trial on the merits due to discovery abuse (Plummer V, 657 F.2d, at 904, App. B-29). There is no reason suggested by the court and none is discernible to explain why a trial on the merits of discrimination suits is more important to the public than a trial on the merits in Constitutional or many commercial cases, so as to justify suspending the application of the discovery rules to plaintiffs who bring discrimination suits. Such a distinction, made without explanation by the court below, invites other courts to make similar distinctions in other areas of the law which these courts view as particularly important to ensure a trial on the merits, despite flagrant discovery abuse.

Moreover, the court below does not explain why plaintiffs in discrimination cases warrant this special treatment. Plaintiffs in complex litigation, such as antitrust or security suits, are just as likely to rely on and to accept without question the advice of their counsel during discovery as are plaintiffs who bring discrimination actions. Yet, currently in these other areas of the law, plaintiffs committing discovery abuse of the magnitude engaged in here, whether relying on counsel or not, have seen their suits dismissed.

To permit the decision below to stand is to invite other courts to select their own disadvantaged parties and insulate them from the normal operation of the discovery or other federal procedural rules. Therefore, artificial distinctions, such as those underlying the decision below, are not compatible with our judicial system.

This Court Should State That The Principles of *National Hockey League* Apply In Discrimination Suits Just As In Other Civil Actions

One way to avoid different courts addressing differently which cases deserve special treatment, which plaintiffs will be held bound by their counsel's misconduct and which will be excused, and which plaintiffs will be accorded a trial on the merits despite willful discovery abuse and which will not, is to do away with discovery sanctions altogether in all areas of civil litigation. Of course, this way contravenes this Court's decision in *National Hockey League*. Therefore, to forestall the very real and foreseeable consequences discussed herein from occurring, this Court should grant Petitioner's Writ and articulate unequivocably that the precepts of *National Hockey League* apply in cases involving discrimination under Title VII and 42 U.S.C. Section 1981.

The record below is particularly appropriate for this purpose since the factual findings and conclusions of the district court have not been questioned or amended on review, and the court of appeals, just as did the district court, determined that plaintiffs willfully and flagrantly abused the discovery process and that their misconduct was not caused or justified by any conduct of defendants during discovery. Under these circumstances, unless *National Hockey League* does not apply to discrimination cases, the district court's dismissal of the plaintiffs cannot amount to abuse of discretion. The record in this case, then, free of factual conflict, together with the serious consequences which flow from the decision of the court of appeals if it is permitted to stand, fully warrants this Court's acceptance of this Writ.

CONCLUSION

For the foregoing reasons, this Court should issue a Writ of Certiorari to review the judgment and opinion of the court below; alternatively, this Court is urged to remand this case for reconsideration in light of and consistent with this Court's decisions in *National Hockey League* and *Roadway*.

Respectfully submitted,

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December 21, 1981.

Appendix

APPENDIX A

Federal Rules of Civil Procedure

RULE 26. *General Provisions Governing Discovery*

* * *

(c) *Protective Orders.* Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

* * *

RULE 30. *Depositions Upon Oral Examination*

• • •

(d) *Motion to Terminate or Limit Examination.* At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

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RULE 37. *Failure to Make or Cooperate in Discovery: Sanctions*

• • •

(b) *Failure to Comply with Order.*

(2) *Sanctions by Court in Which Action is Pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

• • •

(d) *Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request*

for Inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

• • •

APPENDIX B

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 80-1008

JOSEF EGGLESTON and ALBERT VIERA,

Plaintiffs-Appellants,

v.

CHICAGO JOURNEYMEN PLUMBERS' LOCAL UNION No. 130, U.A., et al.,

Defendants-Appellees.

No. 80-1650

EDELL PLUMMER, et al.,

Plaintiffs-Appellants,

v.

CHICAGO JOURNEYMEN PLUMBERS' LOCAL UNION No. 130, U.A., et al.,

Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 77-C-1726—Edwin A. Robson, Judge.

ARGUED APRIL 10, 1981—DECIDED AUGUST 11, 1981

Before FAIRCHILD and WOOD, *Circuit Judges*, and HOFFMAN, *Senior District Judge.**

* The Honorable Walter E. Hoffman, Senior District Judge of the Eastern District of Virginia, is sitting by designation.

WOOD, *Circuit Judge*. This began as a not uncommon civil rights suit against a local union and a contractors association. It was brought by five named plaintiffs, seeking to represent a class of black and Hispanic persons alleging employment discrimination in their efforts to gain entry into the plumbing trade.[1] Controversy quickly erupted between attorneys over mutual discovery efforts which had been limited by the court to class certification issues. Although the complaint was filed in 1977 and was followed by voluminous interrogatories and in excess of 2,600 pages of deposition transcript, the case is before us now with the class issue still unresolved. The trial judge assessed all the fault against counsel for plaintiffs and dismissed the entire suit with prejudice. This appeal followed.

I.

A resolution of the controversy on the merits, the legitimate controversy between the litigants, not the lawyers, is nowhere in sight.[2] We regret that this court must review this type of dispute, because the conduct of this case reveals an abuse of the judicial processes which does a disservice not only to the court and litigants, but also to the public interest in the fair and efficient resolution of disputes.[3]

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[1] The complaint alleges violations of both Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e *et seq.*, and Section 1 of the Civil Rights Act, 42 U.S.C. § 1981. One minor issue concerning the propriety of the trial court's dismissal of plaintiffs' Title VII claim against one defendant will be addressed in Part II of this opinion, *infra*.

[2] This dispute which festered between counsel, we trust, is an exception to their usual levels of professional competence.

[3] Chief Justice Burger has often alluded to the "misuse and abuse of pretrial judicial process," and did so recently in his

Background

The five named plaintiffs are represented to be either black or Hispanic persons who had applied unsuccessfully for apprentice or journeyman membership in the Chicago Journeymen Plumbers' Local Union No. 130. Following those failures, each plaintiff allegedly filed charges with the Equal Employment Opportunity Commission ("EEOC"), and after exhausting that avenue retained counsel and filed suit against the three defendants.

Plumbers' Local Union No. 130 ("Local 130") is alleged to be the labor organization representing all plumbers employed in Cook County, Illinois, and also certain plumbers employed outside the county. Plumbing Contractors Association of Chicago and Cook County ("Contractors Association" or "PCA") is alleged to represent most plumbing contractors within the jurisdiction of Local 130 and to be a co-signatory with Local 130 to a collective bargaining agreement which governs the terms and conditions of employment in the plumbing industry within Local 130's jurisdiction. It is further alleged that the Contractors Association, in consort with Local 130, controls the appren-

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[3] *continued*

Annual Report on the State of the Judiciary delivered to the Mid-Year Meeting of the American Bar Association in Chicago, Illinois, on February 3, 1980. In his year-end Report on the Judiciary, December 29, 1980, the Chief Justice also highlighted the abuse by lawyers of the discovery process as contributing to the unnecessarily high cost of litigation.

For comments on the discovery controversy, *see* Julius B. Levine, *"Abuse" of Discovery; or Hard Work Makes Good Law*, 67 ABA Journal 565 (May 1981). *See also* Judge Milton Pollock, *Discovery —Its Abuse and Correction*, 80 F.R.D. 219 (1978); Judge William H. Becker, *Modern Discovery: Promoting Efficient Use and Preventing Abuse of Discovery in the Roscoe Pound Tradition*, 78 F.R.D. 267 (1978).

ticeship program operated by the Joint Apprenticeship Committee Local No. 130 U.A. ("JAC") which is alleged to be an unincorporated association that is an agent of and operates under the control of Local 130 and the Contractors Association in administering the apprenticeship program. The Committee is directed by a ten-person board, five members selected by the union and five by the Contractors Association.

Plaintiffs contend that substantially all plumbing work in the construction industry in the Chicago metropolitan area is performed under the labor agreement between Local 130 and the Contractors Association. Under the terms of that agreement there are two ways to enter into the plumbing trade and eventually become a "journeyman" plumber. One is to be admitted to the plumbers' apprenticeship program, and the other is to work for five years in the trade and then be recommended by a contractor. This latter procedure, however, first requires a permit from Local 130. At the conclusion of either procedure, the prospective journeyman must pass a test administered by Local 130.

Plaintiffs submit that the defendants have systematically denied admission into the apprentice program to blacks and Hispanics, and in the five-year program, the contractors association has refused to refer blacks and Hispanics to Local 130 to receive the permit necessary to gain the required qualifying experience. In addition to generally excluding blacks and Hispanics, plaintiffs aver that Local 130 has refused to administer the test for journeymen status to blacks and Hispanics and that the test, in any event, is discriminatory and non-valid. It is claimed that each of the named plaintiffs has been rebuffed from pursuing one or the other of the entry programs because of the alleged discrimination.

Discovery Problems

The trial court limited initial discovery to matters relevant to a determination of whether the suit should proceed as a class action.[4] Extensive interrogatories were exchanged, numbering into hundreds of questions and sub-questions. Things did not go smoothly from the outset. A series of motions to compel discovery were filed by each party. The trial judge labored patiently to resolve the questions during a period of months.[5] Next began the oral depositions of the named plaintiffs which lasted about sixteen days before the whole process collapsed. The plaintiffs claim that many questions were racially offensive; were intended to intimidate, harass and belittle plaintiffs; were argumentative, repetitious and obviously outside the knowledge of individual plaintiffs; and were not relevant to class certification issues.

Defendants seek to justify the questions propounded and fault the conduct of plaintiffs' counsel. They cite 965 refusals of the witnesses to answer. Defendants contend that race was a proper subject for inquiry because plaintiffs' complaint made it an issue and failed to identify which plaintiffs were black and which Hispanic. Further, de-

[4] *Plummer* v. *Chicago Journeyman Plumbers' Local No. 130, U.A.*, 77 F.R.D. 399 (N.D. Ill. 1977).

[5] The plaintiffs raise as a separate issue what they label as the prejudicial partiality of the trial judge in presiding over all the continuing and bitter discovery wrangles. They claim there came a time when the judge should have recused himself. We summarily dispose of this issue. The bickering of the lawyers which constantly plagued the trial judge would have frustrated an angel. The lawyers have no one to blame except themselves. The trial judge carefully explained his decisions in reasoned memorandums. Whether we agree with all his decisions or not does not reflect adversely upon the impartiality of the trial judge.

fendants argue that the complaint was confusing in that it did not make clear which plaintiffs were alleging racial discrimination and which were alleging national origin discrimination. Defendants additionally aver that plaintiffs failed to object in court to the alleged harassment or to seek protective orders. Defendants also complain that plaintiffs not only refused to answer numerous questions, but that plaintiffs' counsel declared that certain subject matter areas were off limits. Further, it is alleged that plaintiffs' counsel held as least 127 conferences off the record with their clients under circumstances which suggested "coaching" during the course of the deposition testimony. It is claimed that plaintiffs' counsel generally disregarded the Federal Rules of Civil Procedure and the orders of the court, all of which disrupted the discovery proceedings. Two of the plaintiffs, Eggleston and Viera, it is charged, unilaterally terminated their depositions and refused to appear to complete them. Defendants submit that plaintiffs' counsel did not give accurate information about the necessity of providing an interpreter for Viera. After hours of what is described as futile attempts at examination of Viera, an interpreter was engaged. Later during the deposition Viera became ill and did not complete the deposition. Plaintiffs claim that Viera "collapsed from exhaustion" because of defense counsel's grueling examination.

During his deposition, as an example, Eggleston refused to answer about 200 questions which defendants say were class related and propounded to determine his experience, skill and qualifications to work as a journeyman plumber. Plaintiffs say, however, that the questions were only technical plumbing questions unrelated to class issues and therefore walked out of the deposition offering to return when only class related questions would be asked. Plaintiffs' counsel made it plain that he was not going to submit his clients for opposing counsel's "plumbing test," since

opposing counsel himself "had flunked the legal test so far in this lawsuit," and that plaintiffs' counsel was not prepared "to make him the judge in any plumbing test. . . ." We see no need to set down for posterity all the details of the deposition squabbling. We hope that what has already been briefly mentioned, together with some additional details, will be sufficient to paint the picture for our purposes. As a result, the district court dismissed the claims of Eggleston and Viera and entered a rule to show cause why the three remaining plaintiffs should not also have been dismissed. Five months later, after discovery remained bogged down, the court dismissed the claims of the remaining plaintiffs with prejudice.

Class Action and Discovery Overview

Class actions are governed by Fed. R. Civ. P. 23.[a] Plaintiffs seek to bring their class action under Rule 23(a) and

[a] In pertinent part, Rule 23 provides:

(a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(b)(2). Allegations of discrimination do not constitute a by-pass around Rule 23, as the Supreme Court made clear in *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 431 U.S. 395, 405-06 (1977):

> We are not unaware that suits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs. Common questions of law or fact are typically present. But careful attention to the requirements of Fed. Rule Civ. Proc. 23 remains nonetheless indispensable. The mere fact that a complaint alleges racial or ethnic discrimination does not in itself ensure that the party who has brought

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[6] *continued*

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

> the lawsuit will be an adequate representative of those who may have been the real victims of that discrimination.[7]

Accordingly, some degree of discovery may be appropriate in certain cases to aid making the necessary class determinations. The pleadings are expected to be of assistance, but more information may be needed. *Doctor* v. *Seaboard Coast Line R. Co.*, 540 F.2d 699, 707 (4th Cir. 1976). However, "nothing in either the language or history of Rule 23 . . . gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974).

The trial court in the present case specifically limited discovery to class determination issues. The boundary between a class determination and the merits may not always be easily discernible. *Eisen* has not been interpreted so broadly, however, as to foreclose inquiry into whether plaintiff is asserting a claim which, assuming its merit, will satisfy the requirements of Rule 23 as distinguished from an inquiry into the merits of plaintiff's particular individual claim. *Doctor* v. *Seaboard Coast Line R. Co.*, *supra*, 540 F.2d at 707. Some overlap may be unavoidable.[8] The burden of establishing class requirements rests on plaintiff, *Carracter* v. *Morgan*, 941 F.2d 458, 459 (4th Cir. 1973), but it is often the defendant, preferring not to be successfully sued by anyone, who supposedly undertakes to assist the court in determining whether a putative class should be certified. When it comes, for instance, to deter-

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[7] *See* Comment, *The Class Action and Title VII—an Overview*, 10 U. Richmond L. Rev. 325 (1976).

[8] *See* Rita J. Edwards, *Hearing on Maintainability of a Class Action Suit Should Not Determine Ultimate Merits of Individual Claim*, 11 Houston L. Rev. 732 (1974).

mining whether "the representative parties will fairly and adequately protect the interests of the class," or the plaintiffs' ability to finance the litigation, it is a bit like permitting a fox, although with a pious countenance, to take charge of the chicken house.

Under Rule 23(a) the focus of the class determination inquiry should be on certain criteria. First is numerosity. It ordinarily is not difficult to ascertain if a class approach would be useful to avoid the practical problems of trying to join many named plaintiffs or otherwise clog the docket with numerous individual suits. Except for the class approach many might never receive any redress for the wrong done them. Second is commonality. Ordinarily it is not difficult to determine if there appear to be common questions of law or fact. In a discrimination suit this requirement may be satisfied even though there may be differences in the details of individual claims. The third is typicality. The rule requires that the claims or defenses of the named parties be typical of the claims or defenses of the class. This simply requires a showing, not unrelated to commonality, that others suffer from similar alleged grievances. Nor is this ordinarily a difficult preliminary showing to make in many discrimination cases.

Finally is the requirement that the named parties will fairly and adequately protect the interests of the class members who are not personally involved in the litigation. This requirement is often more difficult to resolve. Whenever certain named persons purport to represent others without their knowledge or consent, the court must be assured that the named parties are qualified and capable of fully pursuing the common goals of the class without collusion or conflicts of interests. That requires competent and experienced counsel able to conduct the litigation. Even so, the class representative's role is limited. It was found not to be enough to defeat a class certification in *Surowitz*

v. *Hilton Hotels Corp.*, 383 U.S. 363, 366 (1966), that the named plaintiff did not understand her complaint at all, could not explain the statements in it, had little knowledge of what the lawsuit was about, did not know the defendants by name, nor even the nature of the misconduct of the defendants. The plaintiff, a Polish immigrant, had relied on her son-in-law. *Surowitz* appears to be an extreme case, but it does illustrate the flexibility and broad area for the exercise of the trial court's common sense and good judgment in particuiar instances.[9]

In addition, provided those criteria are met, there remains one of several other criterion under Rule 23(b) to be satisfied. In the present case plaintiffs allege under (b)(2) that the defendants have acted or refused to act on discriminatory grounds generally applicable to the class rendering final injunctive or declaratory relief appropriate. The invocation by plaintiffs of (b)(2) in the circumstances alleged is not novel, since it appears to have been drafted primarily for racial discrimination cases.[10]

Often it is more difficult to apply those rules to a given situation than their text initially suggests, but with the good faith assistance of the parties, a court should be able "as soon as practicable after the commencement of an action brought as a class action" to make the necessary and appropriate initial determination under Rule 23. After all, a favorable class determination by the court is not cast in stone. If the certification of the class is later deemed to be improvident, the court may decertify, *Sayre* v. *Abraham Lincoln Federal Savings & Loan Ass'n*, 65 F.R.D. 379, 384

[9] Recently the Supreme Court in *Deposit Guaranty National Bank* v. *Roper*, 445 U.S. 326 (1980), and *United States Parole Commission* v. *Geraghty*, 445 U.S. 388 (1980), illustrated in a different context that the fate of the named plaintiff does not always control what happens to the class.

[10] *See* Advisory Committee Notes on Rule 23, Fed. R. Civ. P.

(E.D. Pa. 1974); subclassify, *Wolfson* v. *Solomon*, 54 F.R.D. 584, 592 (S.D.N.Y. 1972), alter the certification, *Hernandez* v. *United Fire Insurance Co.*, 79 F.R.D. 419, 433 (N.D. Ill. 1978), or permit intervention, *United States* v. *Trucking Employers, Inc.*, 72 F.R.D. 101, 106 (D.D.C. 1976). If, as distinguished from the ideal, the class certification inquiry is twisted and misused so as to impede, harass, discourage or to accomplish some other perceived tactical advantage, then the court's firm hand is necessary. In this case the trial court found a wilful failure to make discovery and applied the most severe sanction, dismissal of plaintiffs' cause of action with prejudice under Fed. R. Civ. P. 37.

The Degeneration of Class Issue Discovery

It is necessary to remember that the issue being addressed during discovery was only whether or not this case, brought by three allegedly black and two Hispanic persons, should proceed as a class action upon the allegation that they and others similarly situated had been systematically excluded from the plumbing trade in Cook County because of their race or national origin.

Discovery began with two sets of interrogatories numbering over 200 inquiries submitted to plaintiffs. These interrogatories touched on the employment history of plaintiffs, educational background, efforts to gain entry into the trade and the definition and size of the class plaintiffs sought to represent. Serious trouble erupted later when defendants sought to depose the named plaintiffs. We shall sample only a portion of defendants' interrogatories which were claimed by plaintiffs to have been objectionable.[11]

[11] We acknowledge the assistance given by the brief of the Equal Employment Opportunity Commission as *amicus curiae*, and likewise by the briefs of Chicago Lawyers Committee for Civil Rights under Law, Inc., as *amicus curiae*.

It is asserted that plaintiff Eggleston over about a two and one-half day period was asked racially offensive questions and as a result was instructed by his counsel not to answer certain of those questions.[12] It is represented to us

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[12] In order to fully appreciate the general nature and tone of the race interrogation of Mr. Eggleston, it is necessary, unfortunately, to set forth lengthy selected portions of the transcript:

• • • •

Q Where was your father born, Mr. Eggleston?
A Mississippi.
Q Do you know where in Mississippi your father was born?
A No.
Q Is your father a person of Spanish origin?
A No.
Q Is your father a member of the Negro race?
A Yes.
Q And on what do you base that answer, Mr. Eggleston?
A What you said, the Negro race.
Q Have you ever discussed this case with your father?
A No.
Q What is your mother's name, Mr. Eggleston?
A Willie Anne Eggleston.
Q Is she living, sir?
A Yes.
Q What is her address?
A 1408 Cherry Street.
Q When did you last see your mother?
A I saw her the 4th of July, this year.
Q What is your mother's maiden name?
A Jones.
Q She was born Willie Anne Jones?
A. I don't know whether she was born as Willie Anne Jones, but—
Q That is her name as you know it?
A Yes.
Q Have you ever discussed this case with her?
A No.
Q Where was your mother born?
A Mississippi.

[12] *continued*

Q Do you know in what city or town in Mississippi?

A No.

Q Is your mother a person of Spanish origin?

A No.

Q Do you contend that your mother is a member of the Negro race?

A Yes.

Q And what is the basis for your belief, Mr. Eggleston?

A What has been introduced to me in the educational system of the United States.

Q What is your birth date, Mr. Eggleston?

A 7/17/39.

Q July 17, 1939?

A Correct.

Q Are you a member of the Negro race?

A Yes.

Q Is any ancestor of yours Caucasian?

A I rather not answer.

Q I think it is a proper question. I believe you should answer the question, Mr. Eggleston.

MR. MINER: If you know. If you have first-hand knowledge.

BY THE WITNESS: A I can only go by what my grandmother tells me, you know. I don't know if it is true or not.

BY MR. BARRON: Q What did your grandmother tell you, sir?

A Well, she said our—she said yes.

Q Yes.

Q And is this your mother's mother or your father's mother who told you that?

A My father's mother.

Q Is she still living?

A Yes.

Q What is her name?

A Berta Eggleston. Berta or Bertie.

Q Would you tell us what she said to you about your ancestors?

MR. MINER: Listen. I am going to cut this off right now, and I will just instruct him not to answer any further questions. If you want to raise some doubt as to whether or not Mr. Eggleston is a black man, Howard, you are free to do so; but you have established that both his mother and father are members of the Negro race, and whether some hundred years ago he had some white blood intro-

[12] *continued*
duced into his system is, I think, irrelevant, and I will instruct him not to answer any more questions.

BY MR. BARRON: Q Would you answer the question, please, Mr. Eggleston?

MR. MINER: I have instructed him not to answer.

You can tell him that you are not going to answer the questions when I instruct you not to.

BY THE WITNESS: A I rather not answer.

BY MR. BARRON: Q What is your grandfathers's name, Mr. Eggleston?

A Josef Eggleston.

Q Do you know your great grandfather, Mr. Eggleston, on your father's side?

MR. MINER: Listen, Howard. This is getting bizarre. I am going to instruct him not to answer any more questions about anything beyond his grandparents just so that we might finish this in less than the time it took us to get through Mr. Plummer's deposition.

Mr. BARRON: We are not through with Mr. Plummer's deposition, Mr. Miner.

MR. MINER: I am well aware of that.

BY MR. BARRON: Q Would you answer the question, please, Mr. Eggleston?

* * * *

Q How can you tell if a person is a Negro?

A Because he is different, you know. One, he would—I can describe it to the best of my knowledge.

Q Okay.

A Okay. He is of color, African descent, and, well, I will just let it be at that.

Q Okay. I am asking for your beliefs now, and it is somewhat of an indelicate topic which was raised earlier today.

Can a person who has—who is part black, Negro, and part white be considered to be a black person, a Negro person?

A That depends on how the—I would say the society views him.

Q And that is based primarily on what?

A It is based primarily upon the opinions of the society.

* * * *

Q Do you contend that there are persons who would be described as being Negro who have some Caucasian ancestors?

A Yes.

by plaintiffs that Mr. Eggleston at least appears to qualify as a black.[13] To inquire, for instance, into what Eggleston's grandmother told him about any caucasian ancestors he may have had is a totally unjustified and reprehensible intrusion into personal family history. Defendants claim a license to fully explore race because the complaint was vague and failed to inform defendants which specific plaintiffs claimed to be black or Hispanic, and whether the charge was based on alleged racial or color discrimination or on basis of

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[12] *continued*

Q Do you contend that there are people who would be described as being Caucasian who have some Negro ancestors?

A It's possible.

Q Can you tell me what the difference is between a Negro with some Caucasian ancestors and a Caucasian with some Negro ancestors?

A There would be no difference if you don't classify them already, you know.

Q Besides Negroes, who are included in the class that you purport to represent?

A Hispanos or Hispanic.

Q What is an Hispanic?

A One of Spanish origin.

Q By that, you mean one who is born in Spain?

A Not necessarily.

Q It is a person whose ancestors were born in Spain?

A Well, yes, you could say ancestors.

Q I want to know what you say. Is it a person whose ancestors were born in Spain?

A Yes.

Q Can you tell I am a person of Spanish origin?

A No.

Q So, insofar as you know, I may be a person of Spanish origin, is that correct?

A Right.

* * * *

[13] Mr. Eggleston's counsel in his brief describes his client "as black as coal," and it is not disputed.

national origin. However, we find that defendants offer little justification for the nature and the extent of their interrogation of Eggleston. Defendants, however, claim that similar discovery yielded significant racial information about plaintiffs Rose, Taylor and Viera. We shall briefly examine each.

Defendants point out that Rose testified that he was not Spanish-surnamed and that he considered his race to be mulatto,[14] that Taylor testified that his race was mestizo,[15] and that Viera testified he was white although on his discrimination charges filed with the EEOC he indicated he had suffered racial as well as national origin discrimination. Why it is significant that Rose does not have a Spanish surname escapes us. He testified that both his father and mother were black. When asked upon what he based his knowledge that his father was black, Rose explained because "he has the same type of hair that I do." When asked about the basis of his belief that his mother was black, he declined to elaborate. Taylor testified that he was born in Cuba and came to this country in 1972 "by a political problem." He did testify that he considered his race to be "mestizo," and explained that he considered himself to be part Hispanic, not Negro. Taylor's mother was also born in Cuba and was considered by him to be of Spanish origin. He attempted by way of background to explain that people of Spanish origin were the first to come to the New World and mingled with the natives and others resulting in race combinations which he referred to as mestizo. Viera testified that he was white, but that answer

[14] Mullatto is generally defined as a person with mixed Negro and Caucasian ancestry.

[15] Mestizo is generally defined as a person of mixed parentage sometimes meaning the offspring of a Spaniard or Portugese and an American Indian.

came in response to a question inquiring if he were black. He further testified that he had fled from Cuba in 1972, that his father was Cuban. Ironically, defendants complain of the lack of an interpreter to help them in questioning Viera because he was fluent only in Spanish.

In our view some limited exploration of race was appropriate, but what we have witnessed in this case is an objectional effort by defendants to administer some sort of verbal blood test to each defendant. This is not a paternity suit. It should have been an effort to assist the court in determining whether or not plaintiffs qualified as class representatives in a suit charging that certain minorities were being excluded from the plumbing trade. For the purposes of this case, we do not need a legal laboratory to analyze blood samples drawn from the plaintiffs in order to type them into possible subclasses or for any other reason. It should not be so difficult and disagreeable to determine if plaintiffs are black enough or Hispanic enough to satisfy any reasonable criteria in order to qualify to represent others in class composed of ordinary blacks and Hispanics.

Apart from the racial probing, other avenues of defendants' inquiry deserve examination. Although the deposition was not scheduled as a bar examination, Eggleston and Rose were asked questions some members of the bar might have difficulty answering correctly.[16]

Religion also got some attention. Eggleston was asked if he purported to represent Jews as well as Buddhists. We find no issue of religion in the case.

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[16] For example, Eggleston was asked if he had ever heard of Rule 23 and what the requirements of a class action were. Rose was asked, for instance, if he knew whether Local 130 was "engaged in an industry affecting commerce" or if he knew whether Local 130 was "a labor organization within the meaning of 42 U.S.C. §2000-D." Rose was asked if he knew what subclasses were and if he thought there should be subclasses in this case.

Even though the deposition was not an examination to determine if Eggleston should be issued a plumber's license by the State of Illinois, some of the questions suggest otherwise.[17]

Some of the defendants' questions demonstrate a stubborn tendency to insist on valueless answers.[18]

Some of the defendants' questions were argumentative and senseless.[19]

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[17] For example, Eggleston was asked about fabricating piping systems, principles of corrosion, cross connections, glove valves, check valves, etc.

[18] An example from the interrogation of Rose:

* * * *

Q When you discussed with Mr. Miner [one of the plaintiffs' counsel] the facts known to him which gave rise to your allegations in this complaint, were you and Mr. Miner alone?

A Yes.

Q When you talked to him on the telephone, were there any other persons who were in on that telephone conversation?

A Unless Mr. Miner has a party line, the answer would be no.

Q Is your answer then that you don't know?

A I said unless Mr. Miner has a party line, the answer is no.

Q Does Mr. Miner have a party line?

A You would have to ask Mr. Miner.

Q Do you know whether Mr. Miner has a party line?

A You would have to ask Mr. Miner. I don't pay his telephone bill. I don't know his installations.

Q Do you know whether Mr. Miner has a party line?

A I do not know whether Mr. Miner has a party line.

[19] An example from the Rose deposition will suffice. Reference was made to an exhibit in which a sentence stated that a class action was the best method for the fair and efficient adjudication of the controversy. Rose was asked what the allegation was based on. Rose first answered that it would eliminate racial discrimination. Several questions later that particular sentence was still the object of the interrogation:

* * * *

[19] *continued*

Q How would that sentence eliminate racial discrimination?

A It's the best available method for fair and effective adjudication of the controversy, quote.

Q Is that how that sentence would eliminate racial discrimination?

A Partially.

Q How else would it eliminate racial discrimination?

A By doing what's just.

Q How would it do what is just?

A By dropping the racial barriers.

Q How would that sentence do that?

A I have answered to the best of my knowledge.

Q I don't believe you have answered that question, Mr. Rose.

A As far as Hispanic and black, I have answered it to the best of my knowledge.

Q Would that sentence eliminate discrimination on the basis of sex?

• • • •

Two more pages (six questions) later the matter had not yet been concluded:

Q What is your basis for your allegation that a class action is the best available method for the fair and efficient adjudication of the controversy?

MS. ANDERSON: I am going to object. I think that question has just been answered, and he answered it to the best of his ability.

Now, I don't see why we have to keep going over and over this for five dozen times.

BY MR. MANDEL: Q Mr. Rose, will you answer the question?

A I have answered it to the best of my knowledge. I told you this previously. Now, if you want to badger, go ahead.

Q What is the basis for your belief that class action is the best available method for fair and efficient adjudication of the controversy?

MS. ANDERSON: I am going to instruct him not to answer since he has answered the question to the best of his ability and he has so stated on the record.

• • • •

Some questions were repetitious,[20] or worse.

Other questions sought to test what one plaintiff knew concerning a co-plaintiff's knowledge about the merits of the case.[21]

Defendants defend their extensive explorations, but our examination of their excesses, some of which we have briefly sampled herein, satisfies us that they were more interested in tactics than answers. Defendants did not move to compel

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[20] A concise example from the Eggleston deposition will suffice. Eggleston was asked if he knew who the defendants in the case were. Plaintiffs' counsel objected that the question had been asked and answered just the day before. Defendant's counsel then responded:

* * * *

MR. MANDEL: I'm asking Mr. Eggleston if he *knows today* who the defendants in this case are [emphasis added].

* * * *

[21] Paragraph 12C of plaintiffs' amended complaint alleged that Local 130 had refused to issue licenses or permits to blacks or Hispanics who sought employment as plumbers. A series of questions propounded to Eggleston about not only paragraph 12C but also other paragraphs of the complaint sought to find out what he knew about his co-plaintiffs' claims.

* * * *

Q. Upon what facts do the other plaintiffs in this case base their allegations in Paragraph 12C?

* * * *

Q. Do you know of any of the other facts upon which the other plaintiffs in this case base their allegations in Paragraph 12C?

* * * *

Q. How do you know the allegations in Paragraph 12C are based on facts known to the other plaintiffs?

* * * *

Q. What facts known to other persons is it [Paragraph 12C] based on?

* * * *

answers to many of their more inappropriate questions, so the significance of the omitted questions was not highlighted to the trial judge. After Viera and Eggleston were dismissed, the defendants moved to compel the remaining plaintiffs to answer approximately 408 of the 965 deposition questions which had not been answered. That left approximately 551 unanswered questions to which defendants did not seek to compel answers. If, however, those unanswered questions were not worth pursuing, they were not relevant or worth asking in the first place. The stack of depositions examined by this court exceeds a foot in height and this is supposed to represent discovery solely on the class issue. It is an example of "runaway" discovery which is excessive, burdensome, unnecessary and intrusive. The attack by deposition appears to have been designed for some other purpose than to assist the court in making a class determination. We see no justification for a verbal third degree to resolve the class issue.

The fault, however, is not all one sided by any means. Plaintiffs' counsel must share in the responsibility for this deposition mess. It is difficult to tell which side can be said to have actually started the trouble. In this chicken or egg situation, we have decided to concentrate on the deposition questions as the principal basis for our view of the affair, but that does not mean that we minimize the conduct of plaintiffs' counsel. There were 965 refusals to answer by plaintiffs with only a limited number of those refusals being related to the excesses we have considered. The wholesale practice of plaintiffs in refusing to answer many questions which were unrelated to a claim of privilege, *Ralston Purina Co.* v. *McFarland*, 550 F.2d 967, 973 (4th Cir. 1977), or without taking the initiative of seeking relief from the court

in advance under either Rule 26(c), Fed. R. Civ. P.,[22] or during the course of the interrogation under Rule 30(d), Fed. R. Civ. P.,[23] contributed significantly to the disarray.

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[22] Rule 26(c) provides:

(c) *Protective Orders.* Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

[23] Rule 30(d) provides:

(d) *Motion to Terminate or Limit Examination.* At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party,

Plaintiffs counter that if defendants desired an answer to their questions, it was their responsibility to move under Rule 37(a) for an order compelling discovery. Defendants utilized that remedy to some extent. Plaintiffs also note that defendants (on rare occasions) also instructed their witness not to answer during depositions. There were also an estimated 127 private, off-the-record conferences between plaintiffs and their counsel, many of which occurred between the question and answer or the declination to answer. It is too late once the ball has been snapped for the coach to send in a different play. Sometimes plaintiffs' counsel would interrupt their client's answer and instruct that enough had been said. Other answers were evasive. The parties appeared before the trial judge on five occasions to report on the progress of class discovery, but plaintiffs' counsel did not move for a protective order or complain about the racial harassment now claimed on appeal. There were numerous unprofessional exchanges between counsel more suggestive of an argument in an alley than a professional undertaking. A large share of those exchanges appear to have been provoked by plaintiffs' counsel.

Other obstructive tactics were used. The depositions of Viera and Eggleston were aborted unilaterally by plain-

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[23] *continued*

the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

tiffs, and never completed, although plaintiffs seek to justify those actions. The trial court's warnings were not heeded. Plaintiffs' counsel evidenced little willingness to help resolve the impasse. Instead counsel charged the trial judge with bias.

Having tried to control this situation, the trial judge dismissed Eggleston and Viera for failure to appear to complete their depositions and subsequently dismissed the claims of the remaining three plaintiffs with prejudice for their "evasive and thwarting conduct." Even though we find a reversal to be necessary, we do not fault the efforts of the trial judge. Nor do we endeavor to assign fault to one side or the other, as there is more than enough fault for counsel on both sides to share.

Deposition Procedures

Plaintiffs' wholesale refusals to answer questions, whether the questions were arguably relevant or not, raises deposition procedural questions deserving of brief examination. Some courts view an attorney's direction that a question not be answered (except if privileged) as highly improper, as the answer should be given subject to objection, or the matter raised pursuant to Rule 30(d). *Ralston Purina Co.* v. *McFarland, supra,* 550 F.2d at 973-74. In the Northern District of Illinois where the present case arose, and to some extent in reliance upon it, it is announced in *Coates* v. *Johnson and Johnson,* 85 F.R.D. 731, 733 (N.D. Ill. 1980), that "the general rule in this district is that absent a claim of privilege, it is improper for counsel at a deposition to instruct a client not to answer. If counsel objects to a question, he should state his objection for the record and then allow the question to be answered." Wright & Miller, *Federal Practice and Proceure:* Civil § 2113, at 419 n.22 (1970), is also relied upon as it suggests that the better practice is to

take the evidence subject to objection. It is noted in *Coates, supra,* 85 F.R.D. at 733, that in *Shapiro* v. *Freeman,* 38 F.R.D. 308 (S.D.N.Y. 1965), it was indicated that "[i]t is not the prerogative of counsel, but of the court to rule on objections." Moore, however, states that when either privileged or irrelevant information is sought "the only course it to decline to answer." 4A *Moore's Federal Practice,* 37.02[2] (1981). Plaintiffs, in support of their refusal to answer without seeking court guidance, have supplied numerous affidavits of area attorneys who follow that same practice. Plaintiffs also point to Judge Robson's prior decision in *In re Folding Carton Antitrust Litigation,* 83 F.R.D. 132 (N.D. Ill. 1979), as condoning the practice which they followed.

The district court has wide discretion within the rules to determine the manner and course of discovery. *Burns* v. *Thiokol Chemical Corp.,* 483 F.2d 300, 307 (5th Cir. 1973). We do not propose by this case to impose any particular practice on the district courts. No due process or similar objection has been raised. It does appear that some counsel may not be aware of the local procedures. Confusion about the approved practice may have contributed somewhat to the problems, but does not excuse them in this case.

We believe it would be difficult to fashion a hard and fast rule to apply to all situations which did not at times have impractical side effects. Depositions cannot be taken in the judge's reception room so that the judge always will be readily available to either counsel. Rule 26(b)(1), Fed. R. Civ. P., limits discovery to matters which are not privileged, but it also requires that the matters be "relevant." "Relevant" is defined in Rule 401, Federal Rules of Evidence,[24]

[24] Rule 401 provides:

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

but relevancy in the context of a discovery deposition has a broader meaning. Admissibility at trial is not the test. Evidence is relevant in a discovery context if it is relevant to the subject matter of the litigation as Rule 26(b)(1) states, not just the particular issues presented in the pleadings. A more liberal interpretation is allowed, *Duplan Corp.* v. *Deering Milliken, Inc.*, 397 F. Supp. 1146, 1187 (D.S.C. 1974) (and the cases cited therein), and "flexible treatment" is required, *Sylgab Steel & Wire Corp.* v. *Imoco-Gateway Corp.*, 357 F. Supp. 659, 661 (N.D. Ill. 1973). There is no requirement that every relevant question, as broadly interpreted, which counsel can conjure up must be asked. Only what is reasonably necessary for the particular purpose, in this case class certification, is appropriate.

With a liberal interpretation of relevance comes the risk of abuse and good faith differences of opinion. It is accepted that a question calling for privileged matter need not be answered. To answer subject to an objection of privilege could destroy the privilege. Relevancy, although mentioned in the rule along with privilege, does not necessarily deserve the same respect.

Rule 30(c), Fed. R. Civ. P., says the evidence should be taken subject to the objection. Some questions of doubtful relevancy may be innocuous and nothing is lost in answering, subject to objection, except time. That is the general rule. Other irrelevant questions, however, may unnecessarily touch sensitive areas or go beyond reasonable limits as did some of the race questions propounded to Eggleston. In such an event, refusing to answer may be justified. *In re Folding Cartons* does not condone wholesale refusals, but displays thoughtful flexibility in limited instances. There is no more need for a deponent to seek a protective order for every question when a dispute arises than there is a need to seek to compel an answer for each unanswered

question. If a particular question is important or opens up a whole area of questionable relevance, or other serious problems develop which counsel cannot solve themselves, then resorting to the court may be justified or necessary.

Each side has available remedies. Rule 30(d) protects a deponent from bad faith questioning, or questioning in such a manner as may unreasonably annoy, embarrass, or oppress. There may be times when that rule also deserves a liberal interpretation to curb abuse. On the other hand, Fed. R. Civ. P. 37 provides for compelling a response. Counsel should be able to resolve many of the controversies themselves leaving to the court only those important matters otherwise unresolvable. It may be more practical in some situations to accumulate the unresolved problems so as not to be constantly interrupting a deposition to run to an overworked judge. If it appears that there is a significant disagreement about discovery, it may also be worthwhile to seek a discovery conference under new Rule 26(f). That is permitted at any time after commencement of the suit upon certain conditions. The discovery conference should make the applicable rules clear. If the exercise of common sense and good professional judgment by counsel in a reasonable and flexible manner fail to solve the problem, then remedies are available, and sanctions, too.[25] Each counsel has the responsibility to attempt to resolve conflicts. Different situations may require different steps to be taken. When the court's aid is sought the matter must be fairly and fully presented. In the present case, plaintiffs' coun-

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[25] *See* Note, *Recent Trends in the Enforcement of Discovery: Sanctions in the Federal Courts and in Illinois*, 11 Loyola U. L. J. 773 (1980). For a current discussion of discovery abuse and the use of sanctions in complex litigation, *see* American College of Trial Lawyers Recommendations on Major Issues Affecting Complex Litigations, pp. 5-19 (Feb. 27, 1981). Much of the discussion there need not be restricted to complex litigation.

sel complains here of problems neither fully nor timely brought to the trial court's attention.

Ordinarily we would condone the use of appropriate sanctions when attorneys forsake their professional responsibilities, but in this discrimination case the sanctions fall too heavily upon the individual plaintiffs who were not knowledgeable in the ways of the law, as well as on the other putative members of the class they seek to assist. Members of the putative class, knowing of this present ordeal, could not but be discouraged from instituting similar individual undertakings against these defendants. If there is any merit to the charges of discrimination against minorities by those who control the plumbing trade in the Chicago area, then, too, the dismissal sanction rests too heavily upon the public.

We believe that Senior Judge Robson should be relieved of the burden of this vexatious case by the application of Circuit Rule 18 on remand as the case is still in its initial stages. Discovery on the merits may still lie ahead if a class is certified.

It is not for us to decide whether the class issue has been sufficiently explored to permit its determination. We leave that for the trial court. The volumes of discovery suggest that enough is enough, but it may be found that some additional discovery reasonably may be needed in certain clearly defined areas. If so, it should be expeditiously accomplished.

The Supreme Court in *Hickman* v. *Taylor*, 329 U.S. 495, 507 (1947), acknowledged that "[N]o longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case," but the Court also stated that discovery "has ultimate and necessary boundaries." In a simple discrimination case such as this one, where the only current discovery

issue relates to class certification, although concededly an important issue, the "fishing license" nevertheless need ordinarily be only a limited one with an early expiration date. "It is well established that discovery has limits and that these limits grow more formidable as the showing of need decreases." *United Air Lines, Inc.* v. *United States*, 26 F.R.D. 213, 219 n.9 (D.Del. 1960).

In order to complete discovery upon the class issue or later upon the merits of the Title VII or § 1981 claims themselves, the trial court may find it useful in this case in view of the exceptional circumstances created by the past performances of counsel to consider the appointment of a master pursuant to Rule 53, Federal Rules of Civil Procedure.[26] We recommend this course, as an on the spot "referee" may be needed to expedite further discovery. The costs of using this procedure will fall upon the parties and possibly serve as a deterrent to further abuse. The designation of a magistrate pursuant to 28 U.S.C. § 636(b), while also viable, is a less satisfactory alternative as magistrates have numerous other duties besides refereeing where no referee should ordinarily be needed.

In the circumstances of this case we are lifting the particular sanctions applied to plaintiffs because the general deterioration cannot be attributed solely to plaintiffs. Under the circumstances, we consider it an abuse of discretion to have tried to cure abuse on both sides by denying plaintiffs all opportunity for relief. No hint of further discovery abuse by any party in this case should be tolerated.

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[26] *Ominium Lyonnais D'Etancheite et Revetement Asphalte* v. *Dow Chemical Co.*, 73 F.R.D. 114, 117-18 (C.D. Cal. 1977); *Fisher* v. *Harris, Upham & Co., Inc.*, 61 F.R.D. 447, 449 (S.D.N.Y. 1973), *appeal dismissed*, 516 F.2d 896 (2d Cir. 1975).

II.

Plaintiffs also allege that the trial court erred in dismissing their Title VII claim against defendant the JAC. We agree and therefore reverse the JAC's dismissal.

On October 28, 1975, plaintiff Rose filed a timely EEOC charge alleging that Plumbers' Local 130 had refused to hire him as an apprentice or journeyman plumber.[27] On March 9, 1977, Rose filed an amended EEOC charge, naming PCA, Local 130, the International Union, and the JAC.[28]

The district court, in response to a motion by the JAC, dismissed plaintiffs' Title VII claim against the JAC, *Plummer* v. *Chicago Journeyman Plumbers' Local Union 130, U.A.*, 452 F. Supp. 1127, 1132-36 (N.D. Ill. 1978). In so doing, the court ruled that Rose's original charge did not properly name the JAC; that the mended charge was untimely as it was filed more than 180 days subsequent to Rose's last EEOC application; and that the JAC was not

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[27] Rose's first EEOC charge read:

I have been denied entrance into the plumbers' union because of my race, Black. I was told on 8/12/75 that they were not taking any new apprentices. For the last 14 years they have denied me entrance.

[28] Rose's second charge read:

I have been denied an opportunity to obtain a status of journeyman plumber and entrance into the Plumbers Union because of my race. The last time I aplied was on August 21, 1975. I had also applied on numerous occasions during the past 14 years. During the same period, I have also applied for entrance into the Apprenticeship Program. I was repeatedly given the run-around until August 21, 1975 when I was advised that they were not taking any new Apprentices.

an agent of Local 130 and the PCA and thus could not be sued in such a capacity.[29]

The JAC argues that the dismissal of the Title VII claim was proper because plaintiff Rose failed to name the JAC in his initial charges filed with the EEOC. Title VII provides that if after timely filing of a discrimination charge, the EEOC is unable to obtain compliance with the Act's provisions, "a civil action may be brought against the respondent in the charge" by the person claiming to be aggrieved. 42 U.S.C. § 2000e-5(f)(1). Accordingly, it is well settled that ordinarily a party not named in an EEOC charge may not be sued under Title VII. *Le Beau* v. *Libbey-Owens-Ford Co.*, 484 F.2d 798, 799 (7th Cir. 1973) (Clark, J.); *Williamson* v. *Bethlehem Steel Corp.*, 488 F. Supp. 827, 835 (W.D.N.Y. 1980). This requirement is said to be jurisdictional, *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974), the reason being that the charge serves to notify the charged party of the alleged violation and also brings the party before the EEOC, making possible effectuation of the Act's primary goal of securing voluntary compliance with its mandates. *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711, 719 (7th Cir. 1969). *See Williams* v. *General Foods Corp.*, 492 F.2d 399, 404 (7th Cir. 1974).

With the two-fold purposes of EEOC charge filing in mind, courts have recognized several exceptions to the rule that parties not named in the EEOC charge are not subject to suit in a private civil action. As to one exception of import here, this court has determined that where an un-

[29] Since we determine that Rose's original charge was sufficient to reinstate the JAC within the trial court's jurisdiction, we need not address the propriety of the court's rulings as to the timeliness of the later charge or as to its agency rulings.

named party has been provided with adequate notice of the charge, under circumstances where the party has been given the opportunity to participate in conciliation proceedings aimed at voluntary compliance, the charge is sufficient to confer jurisdiction over that party. *Davis* v. *Weidner*, 596 F.2d 726, 729 (7th Cir. 1979); *Williams* v. *General Foods Corp., supra*, 492 F.2d at 404-05. *Accord, Romero* v. *Union Pacific Railroad Co.*, 615 F.2d 1303, 1311-12 (10th Cir. 1980); *Kaplan* v. *International Alliance of Threatrical and Stage Employees and Motion Picture Machine Operators*, 525 F.2d 1354, 1358-59 (9th Cir. 1975).

The purpose behind this exception is to prevent frustration of the goals of Title VII by not requiring procedural exactness in stating the charges. *Davis* v. *Weidner, supra*, 596 F.2d at 729, *citing, Love* v. *Pullman Co.*, 404 U.S. 522, 526-27 (1972). Complainants often file EEOC charges without the assistance of counsel and are not versed either in the technicalities of pleading or the jurisdictional requirements of the Act itself. *Stevenson* v. *International Paper Co.*, 432 F. Supp. 390, 395 (W.D. La. 1977). They are also not expected to file EEOC charges which specifically articulate in precise terms, a narrow legal wrong which they have suffered, rather EEOC charges are typically detailed in lay-person's terms. *Tillman* v. *City of Boaz*, 548 F.2d 592, 594 (5th Cir. 1977) (per curiam) (and the cases cited therein). It is noted, in addition, that Congress could not have intended that a person filing EEOC charges should accurately ascertain, at the risk of later facing dismissal, at the time the charges were made, every separate entity which may have violated Title VII. *Glus* v. *G. C. Murphy Co.*, 562 F.2d 880, 888 (3d Cir. 1977) (*"Glus I"*). Thus, given the Act's remedial purposes, charges are to be construed with "utmost liberality" and parties sufficiently named or alluded

to in the factual statement are to be joined.[30] *Jenkins* v. *Blue Cross Mutual Hospital Insurance Inc.*, 538 F.2d 164, 166-68 (7th Cir.), *cert. denied*, 429 U.S. 986 (1976); *Sanchez* v. *Standard Brands, Inc.*, 431 F.2d 455, 462-63, 465 (5th Cir. 1970); *Martin* v. *Easton Publishing Co.*, 478 F. Supp. 796, 798 (E.D. Pa. 1979) (and the cases cited therein).

Hence, we must first consider whether Rose's initial charge adequately served to notify the JAC of the alleged violation. Our reference to the record convinces us that the JAC *was* sufficiently apprised of the charge to meet this notice requirement. We begin by noting that five members of the ten person JAC board have been appointed by Local 130. These five individuals, as of the date of Rose's 1975 charge, were *all* serving as officers within Local 130, while simultaneously serving on the JAC. Their positions within Local 130 include respectively: the business manager, the business representative, an executive board member, the vice-president, and the recording secretary. Moreover, the JAC coordinator has served as an elected officer in Local 130 since 1966, and has signed affidavits and other pleadings in this litigation in the JAC's behalf.

The charge itself, which named Local 130, clearly complained of discriminatory exclusion from the apprenticeship program. Given that the JAC administers the only apprentice program of record, the charge was sufficient to apprise both the EEOC and the JAC of the alleged discriminatory practices. *Compare Kaplan* v. *International Alliance of Theatrical and Stage Employees and Motion Picture Machine Operators, supra*, 525 F.2d at 1359.

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[30] We are mindful that while liberality in construction is favored, some minimum standards of statutory compliance are essential in light of the strong emphasis upon voluntary compliance and conciliation. *See Scott v. University of Delaware*, 385 F. Supp. 937, 941 (D. Del. 1974).

Accordingly, in light of the substantial similarity in the interests of the JAC and Local 130—the named party, and given both the JAC representation and implication within the charge itself, we hold that the JAC knew or should have known of the EEOC charge and that their conduct would be subject to EEOC inquiry. *Compare Goodman* v. *Board of Trustees of Community College District 524*, 498 F. Supp. 1329, 1333-34 (N.D. Ill. 1980). Thus, the first prong of this exception, which would permit jurisdiction over the JAC, has been satisfied.

We must also ascertain whether the JAC has been given an opportunity to participate in conciliation proceedings aimed at voluntary compliance with Title VII. While satisfaction of this prong presents some difficulty, we conclude that it also has been met. *See Williams* v. *General Foods Corp., supra*, 492 F.2d at 405.

Resolution of this subissue requires consideration of the policies behind and purposes of conciliation. Conciliation between the parties may solve discriminatory problems without the animosities created by coercion, and it provides the respondent with the chance to voluntarily explain and justify past conduct prior to the expense, publicity, and time consumption associated with litigation. *See Martin* v. *Easton Publishing Co., supra*, 478 F. Supp. at 797; *Scott* v. *University of Delaware, supra*, 385 F. Supp. at 941. However, we are mindful that while conciliation is encouraged, it is not an inalienable right of a defendant. *Gamble* v. *Birmingham Southern Railroad Co.*, 514 F.2d 678, 688 (5th Cir. 1975). These related policies and purposes must be balanced against the "availability of complete redress of legitimate grievances without undue encumbrance by procedural requirements especially when demanding full and technical compliance would have no relation to the purposes for requiring those procedures in the first instance." *Glus I, supra*, 562 F.2d at 888.

Upon balancing these considerations, we find that the JAC has been presented with a sufficient opportunity to conciliate.[31] As soon as the JAC had notice of the charge, either through its Local 130 members or through the JAC coordinator, nothing prevented it from attempting to resolve the alleged discrimination in an amicable manner. Any opportunity to effect voluntary compliance of Local 130 by the EEOC would have necessarily involved contact with the JAC, its coordinator, and its other members. *Compare Kelly* v. *Richland School District 2*, 463 F. Supp. 216, 218-21 (D.S.C. 1978); *Wong* v. *Calvin*, 87 F.R.D. 145, 149 (N.D. Fla. 1980). Thus, the JAC was presented with an adequate opportunity in this regard. Moreover, if a party has a close relationship with a named respondent, as does the JAC, and has actual notice of the EEOC charge, as it is likely the JAC has had, to the extent that the JAC could have participated in conciliation efforts, the JAC "should not be heard to cry 'foul' when later made a defendant in a suit. . . ." *Stevenson* v. *International Paper Co., supra*, 432 F. Supp. at 397-98.

We question, in addition, the futility of presenting the JAC with more of an opportunity to conciliate than was presented herein. The Local 130 itself was unwilling to reach settlement with Rose or any other plaintiff and has fought their lawsuit with unmatched ferocity. It would seem reasonable from Rose's standpoint that if voluntary compliance was not obtainable through the EEOC from Local 130, the addition of the JAC to the conciliation effort would have made little if any difference. This conclusion is supported by the fact that the JAC did not settle the claims against it after Rose filed his later EEOC charge, specifically naming the JAC.

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[31] Thus, we must reject the JAC's argument that it was presented with no opportunity to conciliate.

Since the JAC was properly noticed and provided with the requisite opportunity for conciliation, its dismissal as a Title VII defendant by the district court was error.[32] Thus, the JAC must be reinstated as a defendant to plaintiffs' Title VII claim.

Our reference to the oft-cited factors employed by the Third Circuit and other courts in making this determination compels the same conclusion.[33] In *Glus I, supra*, 562 F.2d at 888, the court combined the factors underlying the established exceptions into a four pronged test for use in determining whether to excuse a failure by an individual plaintiff to name a defendant in the EEOC charge:

> (1) Whether the role of the unnamed party could through reasonable effort by the complainant be ascertained at the time of the filing of the EEOC complaint.
>
> (2) Whether, under the circumstances, the interests of a named party are so similar to the unnamed party's that for the purpose of obtaining voluntary conciliation and compliance it would be unnecessary to include the unnamed party in the EEOC proceedings.

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[32] The JAC is probably an indispensible party for Title VII purposes under Fed. R. Civ. P. 19, as it administers the Local 130-PCA apprenticeship program and controls, in part, access to the plumbing trade. *See Evans v. Sheraton Park Hotel*, 164 U.S. App. D.C. 86, 503 F.2d 177, 183 (1974); *E.E.O.C. v. International Brotherhood of Electrical Workers*, 476 F. Supp. 341, 349-50 (D. Mass. 1979); *Eldredge v. Carpenters 46 Northern California Counties Joint Apprenticeship and Training Committee*, 440 F. Supp. 506, 524-26 (N.D. Cal. 1977) (and the cases cited therein). Given our holding herein, however, we need not reach this issue.

[33] While it is normally within the province of the district court to initially consider such factors and to make the jurisdictional determinations, where that court has implicitly considered the factors and so ruled, and where the record is sufficiently established, as it is here, we may evaluate the factors without remand. *See Romero v. Union Pacific Railroad Co., supra*, 615 F.2d at 1312.

(3) Whether its absence from the EEOC proceedings resulted in actual prejudice to the interests of the unnamed party.

(4) Whether the unnamed party has in some way represented to the complainant that its relationship with the complainant is to be through the named party.

In *Glus* v. *C. G. Murphy Co.*, 629 F.2d 248, 251 (3d Cir. 1980), *vacated on other grounds*, 101 S. Ct. 2013 (1981) (*"Glus II"*), the Third Circuit noted that the four pronged test is not a mechanical one, and accordingly no single prong is to be decisive. Instead, each prong must be carefully evaluated in light of both Title VII's remedial purposes as well as the interests of the parties.

As to the first prong, nothing indicates that Rose had any way of knowing the extent of the JAC's involvement in the allegedly discriminatory action or their motivation. *Compare Green* v. *United States Steel Corp.*, 481 F.Supp. 295, 304 (E.D. Pa. 1979); *Martin* v. *Easton Publishing Co.*, *supra*, 478 F. Supp. at 798. Given the close relationship between Local 130 and the JAC, it would be unreasonable, contrary to the JAC's view, to expect that Rose would be cognizant that the JAC possessed a legal identity separate and distinct from Local 130—the named party. The second prong also supports plaintiffs' position. In addition to the above-detailed considerations concerning the opportunity for conciliation by the JAC, the interests of the JAC, while not identical to those of Local 130, are similar enough that, if Local 130 complied or conciliated, surely the JAC would perforce comply. The conciliation process was not rendered less effective because of the JAC's absence. As to the third prong, no prejudice, contrary to the JAC's assertions, is present in the record and no likelihood of compliance, explanation, or justification is evident. It is highly unlikely, that if the JAC had been given an opportunity to conciliate, that any of the alleged past practices would have been recti-

fied. We again note that the JAC effected no conciliation under Rose's later charge, which specifically named the JAC. The fourth prong, if anything, supports plaintiffs. The JAC's full name—the "Joint Apprenticeship Committee Local 130, U.A." indicates that Local 130 *could* have been the party with whom Rose should have contacted or identified. The close relationship between Local 130 and the JAC both in terms of board members, its coordinator, and the officers could have led Rose to reasonably assume that the interests of both were represented by Local 130.[34] *Compare Glus II, supra*, 629 F.2d at 252.

Circuit Rule 18 shall apply.[35] Parties shall bear their own costs.[36]

REVERSED AND REMANDED.

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[34] While the record is unclear, it appears that the apprentice cards issued by the JAC state that the apprentice holders are affiliates of "Chicago Journeymen Plumbers, Local 130."

[35] On February 4, 1980, the defendant-appellees moved this court to dismiss appeal No. 80-1008 for want of appellate jurisdiction. The motion was denied on March 3, 1980 (Bauer, J.). On March 7, 1980, defendants-appellees' motion for reconsideration of the order denying the motion to dismiss was denied, without prejudice to the defendants-appellees again raising the jurisdictional arguments in the merits briefing of these appeals (Bauer, J.). Finding an absence of discussion of these arguments in the defendants-appellees' briefs, the request for reconsideration of the motion to dismiss is deemed to have been waived. In any event, the denial of the motion to dismiss for want of jurisdiction was proper.

Objection is also made by plaintiffs that sanctions were imposed without a specific order being violated as might be obtained under Rule 37. In view of our disposition of this case that issue need not now be explored.

[36] Nothing in this opinion is intended to imply any view whatsoever as to the possible merit of plaintiffs' claims, but what has happened so far in this case is not the way to find out whether there may be merit or not.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

October 7, 1981

Before

Hon. THOMAS E. FAIRCHILD, Senior Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. WALTER E. HOFFMAN, Senior District Judge*

JOSEF EGGLESTON and ALBERT VIERA, Plaintiffs-Appellants,

No. 80-1008

vs.

CHICAGO JOURNEYMEN PLUMBERS' LOCAL UNION NO. 130, U.A., et al., Defendants-Appellees.

EDELL PLUMMER, et al., Plaintiffs-Appellants,

No. 80-1650

vs.

CHICAGO JOURNEYMEN PLUMBERS' LOCAL UNION NO. 130, U.A., et al., Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division

No. 77-C-1726

Edwin A. Robson, Judge

ORDER

On consideration of the petitions for rehearing and suggestion for rehearing *in banc* and the "MOTION FOR

* The Honorable Walter E. Hoffman, Senior District Judge of the Eastern District of Virginia, is sitting by designation.

LEAVE TO FILE DEFENDANTS-APPELLEES REPLY MEMORANDUM IN SUPPORT OF MOTION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC" filed in the above-entitled cause by counsel for the defendants-appellees, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. According,

IT IS ORDERED that the aforesaid petitions for rehearing and motion be, and the same are hereby, DENIED.

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

EDELL PLUMMER, HAYWARD ROSE, JOSEF J. EGGLESTON, IVOR TAYLOR, and ALBERTO VIERA, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, Plaintiffs, v. CHICAGO JOURNEYMAN PLUMBERS' LOCAL UNION NO. 130, U.A., PLUMBING CONTRACTORS ASSOCIATION OF CHICAGO AND COOK COUNTY, and THE JOINT APPRENTICESHIP COMMITTEE, LOCAL NO. 130, U.S.A., Defendants.	No. 77 C 1726

MEMORANDUM AND ORDER

This cause is before the court on the motions of defendants to compel discovery and for sanctions and on motion of plaintiffs for sanctions. For the reasons hereinafter stated, defendants' motions are granted, and plaintiffs' motion is denied.

These motions arise out of disputes between plaintiffs and defendants in regard to discovery on class action issues. Defendants Chicago Journeyman Plumbers' Local Union No. 130, U.A. [hereinafter Local 130], the Plumbing Contractors Association of Chicago and Cook County [hereinafter PCA], and the Joint Apprenticeship Committee, Local 130, U.A. [hereinafter JAC] seek an order dismissing

with prejudice plaintiff Alberto Viera's claims for refusal to comply with their discovery requests, or, in the alternative, for an order compelling Viera to appear for continuation of his deposition on class issues. Defendants Local 130 and JAC bring the same motion with respect to plaintiff Josef Eggleston. Defendants Local 130 and PCA further seek an order that the remainder of the plaintiffs answer certain questions on class issues which plaintiffs refused to answer during their depositions, questions which were not asked because of plaintiffs' prior stipulated refusals to answer, and additional questions to clarify or amplify the answers given to previously unanswered questions. All defendants seek an order that plaintiffs and their attorneys pay their reasonable expenses including attorneys' fees incurred in connection with the motions to compel. Defendant PCA further seeks an order that plaintiffs and their attorneys pay their reasonable expenses including attorneys' fees incurred in connection with the first day of the deposition of plaintiff Viera. Plaintiffs have responded by their own motion for sanctions and by a memorandum in opposition to defendants' motions to compel. Defendants have replied.

I. Background

Plaintiffs brought their complaint as a class action alleging employment discrimination in the plumbing trade by defendants in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and 42 U.S.C. § 1981. The court limited initial discovery to matters relevant in determining whether this action should proceed as a class action. *Plummer* v. *Local 130*, 77 F.R.D. 399 (N.D. Ill. 1977) [hereinafter *Plummer*]. Interrogatories were exchanged by the parties and answered only after motions to compel were brought by both plaintiffs and defendants.

On May 30, 1978, PCA filed notices of deposition of the five named plaintiffs. On June 2, 1978, plaintiffs requested a meeting with defendants to discuss coordination of the depositions and to request that the depositions cover both class action and merits issues. The parties met with an agreement reached by all defendants with plaintiffs to coordinate the depositions so that each plaintiff would be examined first by PCA, and then by Local 130 and JAC. In addition, based on the court's previous decision to have the parties proceed with class discovery prior to discovery on the merits, the defendants refused plaintiffs' request to extend the depositions to include both class action and merit issues.

After considerable delay, plaintiffs' depositions began on September 12, 1978. At the depositions, plaintiffs' attorneys unilaterally determined which questions they considered to be proper questions and frequently directed their clients not to answer questions they considered to be improper. The five plaintiffs refused to answer 965 questions upon the advice of their attorneys. In addition, many questions were never asked at the depositions because plaintiffs' attorneys announced in advance that their clients would not be permitted to answer questions in certain subject matter areas. Plaintiff Edell Plummer refused to answer 472 questions upon the advice of his attorneys. In addition, defendants did not pursue questions concerning Plummer's experience in the plumbing trade and concerning classmates at Dunbar High School who could have been interested in the plumbing trade, because they stipulated with plaintiffs' attorneys that these questions would be subject to instructions not to answer. Plaintiff Josef Eggleston refused to answer 208 questions upon the advice of his attorneys. His deposition was unilaterally terminated by

his counsel during examination by Local 130. Plaintiff Hayward Rose refused to answer 172 questions upon the advice of his attorneys, and stipulations were entered into by plaintiffs and defendants to the effect that Rose would not answer questions concerning his finances or his plumbing experience. Plaintiff Ivor Taylor refused to answer 71 questions, and stipulations were entered into by plaintiffs and defendants to the effect that Taylor would not answer questions concerning his knowledge or opinion as to the class he sought to represent, his plumbing experience, and plaintiffs' costs and expenses. Plaintiff Alberto Viera refused to answer 42 questions, and a stipulation was entered into the effect that he would not answer questions concerning his own financial resources and plaintiffs' expenses. Viera's deposition was terminated by agreement of the parties because Viera became ill at the deposition. Subsequently, plaintiffs' attorneys refused to produce Viera for his continued deposition despite their previous agreement to do so. The decrease in the refusals to answer in the depositions of Rose, Taylor, and Viera was not due to a decrease in objectionable conduct by plaintiffs and plaintiffs' attorneys. It was due to defendants not asking questions which were earlier the subject of refusals to answer in the depositions of other plaintiffs and to defendants and plaintiffs entering into stipulations that plaintiffs would not answer questions in certain subject areas if the questions were asked.

Plaintiffs and their attorneys further disrupted the deposition proceedings by stopping the depositions on at least 127 occasions to hold conferences with each other out of the presence of opposing counsel and the court reporter. During the depositions, plaintiff Plummer had 27 conferences with his attorney Judson Miner, Eggleston had 8

conferences, Rose had 22 conferences, and Taylor had 69 conferences. Ostensibly, these conferences were for the purpose of clarification but the frequency of the conferences and the fact that many of the conferences took place after a question was asked and before a plaintiff could answer suggest that the attorneys were coaching the plaintiffs. In so doing, plaintiffs' attorneys disregarded their ethical duty under Canon 7, EC 7-19, to put the relevant facts before the court for adjudication by disrupting the orderly discovery process.

Even in the case of plaintiff Ivor Taylor, a Spanish speaking plaintiff; where the conferences may have been necessary because of confusion caused by Taylor's difficulty in understanding English, coaching of the witness appears to have been the primary reason for those conferences. Judson Miner, one of the plaintiffs' attorneys, who admittedly speaks no Spanish, conferred with his client at least 36 times out of the presence of all those in attendance at the deposition. The proper procedure was, as stated by William Snapp, the examining attorney for defendant PCA, to have the witness let examining counsel know if a question was not understood, and the question would then be explained further on the record. Taylor deposition at 210. Subsequently, Mr. Minor brought a Spanish-speaking attorney from his office, George Galland, Jr., to assist him. Within 55 pages of deposition testimony, Mr. Galland had 21 conferences with Mr. Taylor in Spanish, a language that none of the defendants' attorneys understood. Even after an interpreter was brought for the next session of the deposition, plaintiffs' attorneys had 4 more conferences with their client during the deposition.

Plaintiff Josef Eggleston appeared for his deposition on October 31, 1978. After the examination by PCA, Local 130

began its questioning of Eggleston. After refusing to answer 45 questions upon the direction of counsel concerning his experience, skill, or qualifications as a journeyman plumber, plaintiffs' counsel, Judson Miner, unilaterally terminated the deposition. Plaintiffs took no action pursuant to Fed. R. Civ. Proc. 30 (d) to limit or terminate the examination. Plaintiffs have subsequently refused to produce Eggleston to continue his deposition.

After experiencing the frequent conferences between plaintiff Ivor Taylor, a Spanish-speaking plaintiff, and his attorneys (ostensibly because of Taylor's difficulty in communicating in English), defendant PCA's counsel inquired of plaintiffs' counsel whether a Spanish interpreter would be necessary for the deposition of Alberto Viera, a Spanish-speaking plaintiff. Plaintiffs' counsel made no attempt to inform PCA's counsel whether an interpreter would be necessary, so no interpreter was present at the deposition on December 11, 1978. After approximately four hours of examination PCA sought to terminate the deposition until an interpreter could be present, a request which plaintiff's counsel had earlier refused to agree to. At that point plaintiff's counsel agreed that it was futile to proceed without an interpreter. These hours of deposition testimony are almost completely unintelligable. The deposition was resumed the next day with the assistance of an interpreter.

On the following day, Viera became ill and was unable to continue with his deposition. One of plaintiffs' counsel, Nancy Anderson, and defendants' counsel stipulated that Viera's deposition on class issues would be continued to a mutually agreeable date in the future. Despite the stipulation, on January 3, 1979, plaintiffs' counsel, Judson Miner, informed defendants that he would not produce Viera for

the resumption of his deposition. On January 22, 1979, plaintiffs' counsel repeated his refusal. During conversations on February 12, 13, and 14, 1979, plaintiffs' counsel told PCA's counsel that he might produce plaintiff Viera for the continuation of his deposition instead of producing plaintiff Taylor, but PCA refused to waive its right to depose both plaintiffs. Neither Local 130 nor JAC had any opportunity to examine Viera, and PCA had not completed its examination of Viera. Plaintiffs' counsel did not take any action pursuant to Fed. R. Civ. Proc. 30(d) to limit or terminate the examination.

II. Refusals to Answer and Termination of Depositions

A. Refusals to Answer

Hundreds of questions were left unanswered because the plaintiffs being deposed were directed not to answer by their attorneys and whole lines of inquiry were left unasked because plaintiffs' attorneys stated that they would direct their deponents not to answer any questions in particular subject areas. Due to plaintiffs' attorneys' continuous directions to the deponents to refuse to answer relevant deposition questions, the deponents themselves began to refuse to answer questions not to their liking. *See e.g.*, Plummer dep. at 47, 335; Eggleston dep. at 398-400.

At an earlier stage of these proceedings, the court determined that the most efficient way to proceed was for class action discovery and the class action determination to be made prior to discovery on the merits. Nonetheless, the court noted in regard to the interrogatories then at issue that a fine line could not be drawn between class

action discovery and discovery on the merits. The court stated in *Plummer, supra* at 403:

> It should be noted that it is not necessary that the interrogatories relate solely to the class action determination. The mere fact that some of the interrogatories may be relevant to the merits of the case does not mean that they should remain unanswered, so long as they relate to the class issues or are readily calculated to lead to the discovery of information relevant to the class issues.

Plaintiffs' attorneys took upon themselves the judicial role of determining which questions asked by the defendants at the depositions concerned the class action aspects and which questions concerned the merits after the court had set broad guidelines for class discovery. Plaintiffs' attorneys thus limited discovery to what they deemed to be the appropriate limitations and now assert that defendants have been provided with all the discovery they are entitled to. Plaintiff's Memo in Opposition, at 16.

One of plaintiffs' attorneys, Nancy Anderson, succinctly stated the position that plaintiffs' attorneys have taken throughout the depositions:

> It's my responsibility to instruct my client not to answer any questions which I think are improper or not relevant to this deposition. I have made the determination that your questions with respect to Paragraph No. 7 are not relevant to this deposition, and I have instructed him not to answer. Rose dep. at 267.

Although it is entirely proper and necessary for an attorney to object to questions considered improper, it is entirely improper for an attorney to instruct her client not to answer questions considered to be improper or irrelevant absent *extreme* harassment by the examining attorney. If plaintiffs' attorneys thought that the examination of their

clients was oppressive and in bad faith, the proper procedure would have been to move pursuant to Fed. R. Civ. P. 30(d) to limit or to terminate the examination. Fed. R. Civ. P. 30(c) unequivocally mandates that at depositions evidence is to be taken subject to the objections. *Shapiro* v. *Freeman*, 38 F.R.D. 308, 311 (S.D.N.Y. 1965) [hereinafter *Shapiro*]. As the court stated in *Shapiro*, *supra* at 311:

> It is not the prerogative of counsel, but of the court, to rule on objections. Indeed, if counsel were to rule on the propriety of questions, oral examination would be quickly reduced to an exasperating cycle of answerless inquiries and court orders.

By instructing their clients not to answer 965 questions plaintiffs' attorneys ruled on their own objections. The result was a cycle of answerless inquiries and now, this court order. Plaintiffs' unilateral determination of the propriety of deposition questions without a court order was highly improper and in contravention of the federal rules.

1. Duplication

Plaintiffs contend that many of the refusals to answer were proper because the same subject areas were covered in the answers plaintiffs gave to defendants' interrogatories. Plaintiffs contend that questions in regard to plaintiffs' qualifications, experience, and training and questions relating to the existence, size, and internal conflicts of the class were thus properly the subject of refusals to answer. Plaintiffs further contend that the refusals to answer were proper because defendant PCA insisted on engaging in mindless repetitive questioning and that defendant Local 130 engaged in extensive duplicative questioning.

Deponents cannot refuse to answer deposition questions without moving for a protective order pursuant to Fed. R.

Civ. P. 26(c)(3) to limit the depositions to matters not covered by the previous interrogatories or without moving pursuant to Fed. R. Civ. P. 30(d) to limit the deposition examination. Furthermore, the court has serious doubts whether a protective order would have been necessary absent the presence of such circumstances as the assertion of a privilege, or repetitive questioning following a full examination because neither circumstance was present here. *Compare, In Re Folding Carton Antitrust Litigation, Pretrial Order No. 54,* 83 F.R.D. 132 (N.D. Ill. 1979). Plaintiffs' answers to interrogatories on the areas subsequently covered by deposition questions were often vague, conclusory, and contradicted when plaintiffs' attorneys allowed their clients to answer. A fuller, deeper probing in depositions of matters previously covered in the interrogatories and depositions is entirely proper especially in the circumstances here where the witnesses are adverse parties and have been evasive and nonresponsive throughout the discovery process. *Worth* v. *Trans World Films,* 11 F.R.D. 198 (S.D.N.Y. 1951). These circumstances are present here where, for example, plaintiff Ivor Taylor in questioning by PCA stated that he knew of about 100 hispanics who tried to become members of Local 130 and in questioning by Local 130 stated that he could not even identify two hispanics who had applied for journeyman membership in Local 130.

As to the alleged repetitive questioning, PCA correctly points out that no repetitious questions on its part are the subject of its motion to compel as plaintiffs admit in their exhibit 14 in stating their grounds for objection to the PCA's questions. As to the alleged duplicative questioning on the part of Local 130, Fed. R. Civ. P. 26(a) does not limit the scope of discovery so as to prevent a party from examining a deponent in the same subject areas as a previous party but with different questions. *New Sanitary*

Towel Supply Inc. v. *Consolidated Laundries Corp.*, 24 F.R.D. 186, 189 (S.D.N.Y. 1959). Defendants proceeded properly by conducting their examination sequentially. *Burstin* v. *Slote*, 12 F. R. Serv. 2d 577, 579 (S.D N.Y 1968). In addition, the court finds that defendant Local 130's questions were not duplicative.

2. Class Discovery Questions.

Defendant PCA seeks answers to questions concerning the qualifications, experience, and training of the plaintiffs and the alleged class members and defendant Local 130 seeks answers to questions concerning plaintiffs' skills and qualifications to become journeyman plumbers and plaintiffs' applications to Local 130. Plaintiffs contend that the third amended complaint sets forth ample facts demonstrating that plaintiffs are a part of the class. Plaintiffs further contend that their refusals to answer were proper because these questions relate to the merits rather than to class issues and because acceptance of defendants' position would require a class plaintiff to prove the merits of his claim before he could represent a class. Plaintiffs further contend that because this action challenges the pattern and practice of discrimination in the plumbing trade, the precise qualifications of any plaintiff will be irrelevant to plaintiffs' proof on the merits.

Prior to the completion of most of the depositions, plaintiffs filed their motion for class certification and have continued to demand that the class certification issue be briefed. Plaintiffs' approach seems to have been that no discovery is necessary for class determination so that they may properly refuse to answer numerous questions which are relevant to class certification. To the contrary, it is essential for the court and the parties to have specific information about the class so that there is both understanding of the precise nature of plaintiffs' claim and so that

the class action determination is made "in a practical and realistic way based on an informed understanding of what is actually involved in the litigation." *Gneiting* v. *Taggars*, 62 F.R.D. 405, 406 (D. Idaho 1973). *See also Doctor* v. *Seaboard Coast Line Railroad Co.*, 540 F.2d 699, 707 (4th Cir. 1976). Previously, this court denied defendants' motions for a more definite statement stating that discovery was the appropriate means of obtaining information about the nature of plaintiffs' claims. *Plummer, supra* at 1144. Thus, the court has determined that discovery concerning the class claims is necessary beyond the complaint.

The questions concerning plaintiffs' qualifications were improperly the subject of refusals to answer because the questions directly concern satisfaction of two of the prerequisites of Fed. R. Civ. P. 23 class certification: the presence of a class and plaintiffs who are members of that class. In addition, plaintiffs allege in paragraph 5 of the third amended complaint that one of the questions common to a class is "whether defendants have refused to permit experienced black and hispanic plumbers to take an examination for journeyman status." Because this alleged common question concerns experienced black and hispanic plumbers, the extent of plaintiffs' qualifications and experience is an important inquiry in the determination whether the plaintiffs can represent this class. Inquiry is proper to determine whether the plaintiffs who seek to be class representatives suffered the same injury and possess the same interests as the class sought to be represented. *Miller* v. *Motorola, Inc.*, 76 F.R.D. 516, 518 (N.D. Ill. 1977). Contrary to plaintiffs' contention, this inquiry is proper even in a pattern and practice law suit. *Garrett* v. *R. J. Reynolds Industries*, 19 FEP 13, 17 (M.D.N.C. 1978). Furthermore, the discovery sought did not require plain-

tiffs to prove the merits of their claim for class certification purposes.

Defendants Local 130 and PCA further seek to compel answers concerning plaintiffs' financial ability, their willingness to finance this litigation, and any agreements among plaintiffs or with their attorneys or any other person concerning the financing of this litigation. Plaintiffs contend that they have already extensively testified in their depositions to their willingness and ability to pay for the costs of this lawsuit. Plaintiffs further contend that inquiry into plaintiffs' willingness and ability to pay for the costs of this lawsuit is moot because the NAACP Legal Defense Fund has recently agreed to pay all costs of this litigation.

Inquiry into the existence or nature of any agreements concerning financing is a relevant issue at this time especially in light of the newly-raised commitment by the NAACP Legal Defense Fund to participate in the financing of the lawsuit. This information will help determine whether the named plaintiffs are the real parties in interest and if a class is certified, whether they are suitable as class representatives. *See In re Goldchip Funding Co.*, 61 F.R.D. 592, 595 (M.D. Pa. 1974). Further, at the present time the court has no documentation evidencing the Legal Defense Fund's interest or commitment to this litigation.

Since we have no binding commitment from the Legal Defense Fund to pay plaintiffs' costs, plaintiffs' ability to meet their financial responsibilities, especially if unsuccessful on the merits, is relevant to the class certification issue. *See Chevalier* v. *Baird Savings Association*, 72 F.R.D. 140, 147 (E.D. Pa. 1976). Because there may be any number of reasons why a third party who is not before the court but has agreed to assume costs may nonetheless be unwilling or unable to continue to pay or advance costs, inquiry into a

representative plaintiffs' resources is appropriate prior to class determination.[1] *Rode* v. *Emery Freight Co.*, 76 F.R.D. 229, 232-33 (W.D. Pa. 1977).

Defendant PCA seeks to compel answers to questions concerning the existence, size, and internal conflicts of the class. Plaintiffs respond that the record is replete with detailed answers, so no further inquiry is necessary.

Plaintiffs are incorrect in asserting that the record is complete. In addition, whether further inquiry is necessary is not the issue where plaintiffs improperly refused to answer without seeking a court order. Because the procedure plaintiffs followed was totally improper without a court order limiting the examination, plaintiffs' objections will be overruled.

Defendant PCA also seeks to compel answers to questions concerning the factual basis for allegations of the complaint. Plaintiffs properly point out that there are limits upon the detailed knowledge that a class plaintiff needs to have about the factual and legal basis of a complaint. *Hernandez* v. *United Fire Insurance Co.*, 79 F.R.D. 419, 425-27 (N.D. Ill. 1978). Nonetheless, defendant PCA is entitled to answers concerning whether particular allegations of the complaint alleging discrimination are allegations of a particular plaintiff. Because of the multiple plaintiffs and defendants, defendants are entitled to know which plaintiff raises which claim against which defendant.

Throughout the examination of the plaintiffs, plaintiffs' attorneys continued to obstruct and frustrate the deposi-

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[1] Plaintiff Edell Plummer refused to answer questions concerning the identification of his bank account, unless defendants agreed that the information would not be revealed outside of this lawsuit. Defendants were unwilling to enter into any kind of stipulation in this regard. A stipulation should properly be worked out limiting disclosure of this information for the purposes of this lawsuit only.

tion examinations by advising and instructing the plaintiffs not to answer. The statement the court made in *Shapiro, supra* at 312, concerning plaintiffs' counsel is equally applicable here:

> Rather, he appears to be bent on concealing vital facts or, at best, waging a war of delay, expense, harrassment and frustration. There is no justification for his conduct, no basis at all for his instructing the deponents not to answer. As a result, the cooperative atmosphere envisaged by the federal rules has been poisoned by antagonism.

The depositions here were unnecessarily protracted and resulted in a waste of time in obtaining relevant evidence in areas important to class determination. Plaintiffs' attorneys did not follow the proper procedures contained in Fed. R. Civ. P. 30(d) for protecting against bad faith discovery practices. *W. R. Grace Co.* v. *Pullman, Inc.*, 74 F.R.D. 80, 84 (W.D. Okla. 1977).

B. Termination of Depositions

This court ordered discovery to proceed expeditiously on the class issues in ruling upon plaintiffs' motion to compel answers to interrogatories. Subsequently, plaintiffs were properly noticed for depositions and appeared for their depositions. The depositions of both Alberto Viera and Josef Eggleston were unilaterally and wilfully terminated resulting in the complete denial of examination of Viera on the part of defendants JAC and Local 130 and of Eggleston on the part of defendant JAC. Defendant PCA also did not complete its examination of Viera and Local 130 did not complete its examination of Eggleston prior to the terminations. The previous order of the court to proceed expeditiously with class discovery and the notice of depositions, having the effect of a court order, *Chagas* v. *United*

States, 369 F.2d 643, 644 (5th Cir. 1966), were wilfully violated.

Although plaintiffs contend that the depositions were harassing and a complete waste of time, the discovery rules governing federal practice do not in any way countenance the unilateral termination of the depositions of two plaintiffs by the plaintiffs' attorneys without a court order pursuant to Fed. R. Civ. P. 30(d). *Bourgeois* v. *El Paso Natural Gas Co.,* 20 F.R.D. 358 (S.D. N.Y. 1957), *aff'd,* 257 F.2d 807 (2d Cir. 1958). For plaintiffs' counsel to state, "listen, this is silly," in terminating the Eggleston deposition is not a sufficient reason for the limitation or termination of a properly noticed deposition. Unlike the *Rosenblum* v. *Dingfelder,* 2 F.R.D. 309, 310 (S.D. N.Y. 1941) case, where the deponent was fully examined, the depositions of Viera and Eggleston were not terminated after a full examination by the defendants.

III. Sanctions, Attorney's Conduct, Costs and Conclusion

For wilful failure to make discovery, Fed. R. Civ. P. 37(d) provides for dismissal with prejudice. *Bollard* v. *Volkswagen of America, Inc.,* 56 F.R.D. 569, 584 (W.D. Mo. 1971). *See also Foss* v. *Gerstein,* 58 F.R.D. 627, 630 (S.D. Fla. 1973). Although this most severe of sanctions must be tempered with discretion, the circumstances present here of the unilateral termination of the depositions of two plaintiffs by the plaintiffs' attorneys justifies the imposition of this sanction. This is especially true because the Eggleston deposition was terminated after numerous refusals to answer questions of Local 130 which were relevant to the class issue. The Viera deposition was terminated with the stipulation by all counsel that the deposition would be continued and then one of plaintiffs' counsel refused to abide by a stipulation entered into by his co-counsel. Accordingly, the

claims of plaintiffs Eggleston and Viera will be dismissed with prejudice pursuant to Fed. R. Civ. P. 37(d) for their flagrant violation of the discovery rules.

As to the remaining plantiffs, their evasive and thwarting conduct is also deserving of the harshest sanction. This is particularly so because plaintiffs are potential representatives of absent parties whose interests may be seriously injured by plaintiffs' irresponsible actions. The plaintiffs cannot undertake to represent a putative class, seeking broad and sweeping relief, and then adopt an attitude of callous indifference to the rules of procedure of this court thereby impeding the progress of orderly adjudication of the claims they present. For this reason, the court will enter a rule on plaintiffs Plummer, Rose, and Taylor to show cause why the entire complaint should not be dismissed with prejudice.

Turning to the conduct of plaintiffs' attorneys, their conduct was obstructive and obnoxious to such a degree that is suggests that they consciously and wilfully disregarded the civil practice rules. Judson Miner, as the only plaintiffs' attorney present at the Plummer deposition advised the witness to refuse to answer 472 questions and conducted 27 conferences with him outside of the presence of opposing counsel and the court reporter. Nancy Anderson, as the only plaintiffs' attorney at the Eggleston deposition, advised the witness to refuse to answer 208 questions. Miner and Anderson were both present during portions of the Taylor deposition. Anderson appears to have been primarily involved in instructing Taylor not to answer, whereas Miner conducted the majority of the 69 conferences with the witness. In Rose's deposition, Miner and Anderson were present on different days of his deposition. Anderson was present at Viera's deposition and when

he became ill, she agreed to produce him for further examination. Miner reneged on this agreement to produce Viera for further deposition. Both Miner and Anderson appear to be responsible for the failure to communicate with defendants concerning the need for interpreters of the Spanish-speaking deponents, Viera and Taylor.

Rule 23 imposes a special obligation of court supervision as to many aspects of class litigation, including the quality and character of counsel's representation of the class. It is well-settled that class action counsel are expected to adhere to the highest standards of professional behavior. This obligation is in the nature of a fiduciary duty that arises at the filing of the class action complaint and continues throughout the litigation. 2 H. Newberg Class Actions, § 2705, at 1172 (1977). Plaintiffs' counsels' conduct as set out above was improper when they limited the scope of deposition examination unilaterally, and ultimately terminated two depositions. Their constant instructing and conferring with the witnesses during the deposition examination demonstrates an attitude of disdain for the orderly conduct of witness examination. Their lack of professional courtesy and obstructive conduct in refusing to respond to the need for Spanish interpreters is, in the court's view, unjustifiable. For these reasons, the court will enter a rule against plaintiffs' counsel, Judson Miner and Nancy Anderson, to explain their unprofessional conduct in the discovery phase of this litigation.

As noted above, plaintiffs' attorneys failed to notify PCA that an interpreter would be necessary for Viera's deposition after PCA's inquiry and they continued to direct PCA to proceed with the deposition, despite the fact that the testimony without an interpreter was unintelligible because Viera understood almost nothing of the questions asked

him. The actions of plaintiffs' attorneys were inexcusable because PCA's inquiry came after they encountered language difficulties in examining Ivor Taylor, another Spanish-speaking plaintiff. Thus, plaintiffs' attorneys increased the costs to PCA unreasonably and vexatiously. The court will enter a rule to show cause why they should not be ordered to satisfy personally the excess costs of the examination of Viera without an interpreter. 28 U.S.C. § 1927; *Toledo Metal Wheel Co.* v. *Foyer Brothers & Co.*, 223 F. 350 (6th Cir. 1915).

In addition, because the refusals to answer were entirely improper absent a court order, plaintiffs' opposition to these motions to compel was not substantially justified. The arguments of the parties having been heard, plaintiffs are directed to pay to the moving parties their reasonable expenses, including attorneys' fees, incurred in bringing the motions to compel: Fed. R. Civ. P. 37(a)(4). *Addington* v. *Mid-American Lines*, 77 F.R.D. 750, 752 (W.D. Mo. 1978).

As to the plaintiffs' motion for sanctions, plaintiffs state no grounds for the imposition of sanctions upon defendants. Thus, plaintiffs' motion for sanction will be denied.

For the reasons stated, it is therefore ordered that the motions of defendants to compel discovery and for sanctions shall be, and the same is hereby, granted, and the motion of plaintiffs for sanctions shall be, and the same is, hereby denied.

/s/ EDWIN A. ROBSON
SENIOR JUDGE

November 19, 1979.

APPENDIX E

E-1

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

EDELL PLUMMER, HAYWARD ROSE, and IVOR TAYLOR, Individually and on behalf of all others similarly situated, Plaintiffs, v. CHICAGO JOURNEYMAN PLUMBERS LOCAL UNION NO. 130, U.A., PLUMBING CONTRACTORS ASSOCIATION OF CHICAGO AND COOK COUNTY, and THE JOINT APPRENTICESHIP COMMITTEE, LOCAL NO. 130, U.A., Defendants	No. 77 C 1726
	Consolidated with
ISRAEL REYES, Individually and on behalf of all others similarly situated, Plaintiff, v. CHICAGO JOURNEYMAN PLUMBERS LOCAL UNION NO. 130, U. A., PLUMBING CONTRACTORS ASSOCIATION OF CHICAGO AND COOK COUNTY, and THE JOINT APPRENTICESHIP COMMITTEE, LOCAL NO. 130, U.A., Defendants.	No. 79 C 2364

MEMORANDUM AND ORDER

This cause is before the court on the matters of a rule to show cause why the complaint should not be dismissed in

77 C 1726, *Plumber, et al.* v. *Chicago Journeyman Plumbers Local Union No. 130, et al.*, as to the remaining plaintiffs, Edell Plummer, Hayward Rose and Ivor Taylor, a rule to show cause as to plaintiffs' attorneys, Judson Miner and Nancy Anderson, to explain their unprofessional conduct in the discovery phase of this litigation, a rule to show cause why these attorneys should not bear the excess costs of the Viera deposition taken without an interpreter, and plaintiffs' motion for the court to recuse itself. The court also has before it a rule to show cause why the complaint should not be dismissed in 79 C 2364, *Israel Reyes* v. *Chicago Journeyman Plumbers Local Union No. 130, U.A., et al.*, for lack of jurisdiction and plaintiffs' motion for the court to recuse itself. For the reasons hereinafter stated, the rule against plaintiffs Plummer, Rose and Taylor will be made final and the complaint will be dismissed. One rule against attorneys Miner and Anderson will be made final and the matter of their conduct referred to the Executive Committee of the United States District Court for the Northern District of Illinois. The other rule concerning the Viera deposition costs will be vacated. Plaintiffs' Plummer, Rose and Taylor motion for the court to recuse itself will be denied. In the *Reyes* case, the rule to show cause shall be vacated, and the Title VII count of his complaint dismissed. Reyes' motion for the court to recuse itself will be denied.

Facts

The factual background of these varied motions and rules to show cause appears in two previous orders of the court entered on November 19, 1979, in the *Plummer* action and on February 7, 1980, in the *Reyes* action. The facts will not be repeated except as is necessary to explain the instant matters.

Rule to Show Cause Against Plummer, Rose and Taylor

As the court previously noted in its order of November 19, 1979, during the oral depositions of plaintiffs Plummer, Rose and Taylor, these three witnesses refused to answer a total of 715 questions concerning the class action aspects of their complaint. In that order the court noted why plaintiffs' refusals to answer were both substantively and procedurally improper. Further, the court entered a rule against them to show cause why their complaint should not be dismissed based on this improper conduct during their depositions. In response, plaintiffs contend that they are entitled to a further opportunity to appear and answer questions at their depositions because they have not previously been compelled under Fed. R. Civ. P. 37(a) to answer the particular questions defendants propounded. They claim that dismissal is improper except where there has been willful disobedience of a court order or a complete failure to comply with discovery and that neither circumstance is present here. Defendants assert that dismissal is proper under Rules 37(b)2, 37(d) or Rule 41(b).

Rule 37(b)2 provides in relevant part that ". . . if a party fails to obey an order to provide or permit discovery, *including* an order made under subdivision (a) [regarding motions by discovering party to compel discovery], the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following [subp. c] . . . dismissing the action or any part thereof . . ." (Emphasis supplied).

The Advisory Committee Notes that accompanied the amendment of Rule 37 in 1970 state that the purpose of this language was to broaden the scope of the Rule "by extending it to include any order to 'provide or permit discovery' including orders for discovery issued under Rules

37(a) and 35." Thus, contrary to plaintiffs' contention, the order compelling discovery does not have to be a Rule 37(a) order. Disobedience of an order, whether pursuant to Rule 37(a) or not, and whether written or oral, which notifies the party that compliance must be forthcoming is sufficient basis for imposition of the harshest sanction. *See e.g., Henry* v. *Sneiders,* 490 F.2d 315, 318 (9th Cir. 1974); *Cine Forty-Second St. Theatre* v. *Allied Artists,* 602 F.2d 1062, 1065 fn. 5 (2d Cir. 1979).

As early as December 19, 1977, the court stated its position on the proper focus of discovery for this purported class action. In denying plaintiffs' motion to permit discovery on the merits in interrogatories and requests to produce documents, the court ruled that discovery on class issues should first proceed but that "any witness deposed on class issues could be interrogated on matters going to the merits so that he need not suffer the inconvenience of being recalled." *Plummer* v. *Chicago Journeyman Plumber's* Local Union No. 130, 77 F.R.D. 399, 402 (N.D.Ill. 1977), [hereinafter *Plummer I*].This order merely reiterated the court's prior oral directions to the parties. (Transcript of proceedings, July 22, 1977; and November 11, 1977). The court also stated that concerning the interrogatory answers plaintiffs sought from defendants, the "mere fact that some of the interrogatories may be relevant to the merits of the case does not mean that they should remain unanswered, so long as they relate to the class issues or are reasonably calculated to lead to the discovery of information relevant to the class issues." *Plummer I, supra* at 403.

Furthermore, in April, 1978, when denying defendants' motion to dismiss and for a more definite statement, the court stated "[i]f the defendants desire further information about the nature of plaintiffs' claims discovery is the ap-

propriate means for obtaining it, as well as for developing the issues." *Plummer* v. *Chicago Journeyman Plumbers' Local Union No. 130*, 452 F. Supp. 1127, 1144 (N.D.Ill. 1978), [hereinafter *Plummer II*]. On the issue of the sufficiency of the class allegations the court ruled that defendants "[could] ascertain through discovery whether plaintiffs are adequate and typical representatives." *Id.* Thereafter, the parties appeared at status reports on September 19, 1978, October 6, 1978, and January 22, 1979, to inform the court of their progress on the last outstanding class issue discovery, that is, the depositions of the five named plaintiffs. The court continued to admonish the parties to proceed, to cooperate and to work together, *e.g.*, transcript of October 6, 1978, at 7. The parties reported their problems in setting deposition dates on week days, the failure of deponents to complete answers to questions and of the instructions to the witnesses. The court stated that it expected to hear Mr. Miner's comments on his disagreements (Transcript of September 19, 1978, at 5). Finally, the court moved to set a discovery cut-off date and set a date for filing of a pretrial order covering the factual background for the class action determination. (Transcript of January 22, 1979, at 3-7).

In the face of the named plaintiffs' continuing refusals to answer questions concerning class issues on their counsels' instructions as to which questions they considered improper or irrelevant, defendants were forced to bring motions to compel answers. As the court previously found, the refusals to answer were entirely improper absent a protective order from the court and had they brought a motion for a protective order, the court would have denied it because there were insufficient grounds for entering such an order. Moreover, the reasons plaintiffs offered for their conduct were clearly inadequate because of the previous

orders of the court to permit class issues discovery and to permit deposition witness to testify as to class issues. As noted above, the court had previously ordered that examination of a deposition witness should not be limited to class issues when the witness would be inconvenienced by redeposition on merits issues. *Plummer I, supra* at 402. In response to defendants' previous motion to compel discovery, plaintiffs stated that at defendants' insistence they agreed to limit the initial deposition examination of the named plaintiffs to class issues. Thereafter, plaintiffs improperly refused to answer questions they deemed irrelevant to class issues, which amounted to a substantial portion of the defendants' questions. Plaintiffs cannot now claim that they did not understand their obligation to answer the defendants' questions concerning class issues when this court's previous orders as well as Fed. R. Civ. P. 30(c) mandated their answers. Because dismissal is proper pursuant to Fed. R. Civ. P. 37(b)2, it is moot whether dismissal is also proper pursuant to Rules 37(d) and 41(b).

As recently stated by the court in *Cine Forty Second St. Theatre* v. *Allied Artists, supra* at 1068, ". . . compulsion of performance in the particular case at hand is not the sole function of Rule 37 sanctions." A court must weigh the entire record of the case and then impose whatever sanction is necessary to impress upon the noncomplying litigants and most particularly, their attorneys, that the court will not tolerate dilatory tactics, gross professional negligence or fundamental obstinance. *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 629, 642 (1976). As representatives of a purported class, plaintiffs were under a special obligation to cooperate with discovery because discovery from absent class members is ordinarily unavailable. *Dellums* v. *Powell*, 566 F.2d 231,

236 (D.C. Cir. 1977). Dismissal of the action is appropriate here, where the plaintiffs have flouted their clear obligation to answer questions concerning the class issues in this case. This harsh sanction must be applied because of the willful disobedience of the court's prior orders and because it is incumbent upon the court to make it clear that there is no place for this kind of conduct in class action lawsuits. Therefore, the court will make final the rule to show cause against plaintiffs Plummer, Rose and Taylor. The complaint will be dismissed as to all defendants with prejudice.

Rules to Show Cause Entered Against Miner and Anderson

In response to the Court's Memorandum and Order of November 19, 1979, Miner and Anderson have made motions to vacate the rules to explain their unprofessional conduct and to show cause why they should not be ordered to satisfy personally the excess costs of the examination of Veira without an interpreter. They also ask the court to strike the findings of and all references to unprofessional conduct. If these motions are denied, Miner and Anderson additionally move to have the court set the question of their unprofessional conduct for a full evidentiary hearing; to refer the matter to the Executive Committee for assignment to another judge of this district for hearing and; to delay consideration of publication of the opinion until after the conclusion of such evidentiary hearing.

As a preliminary matter, Miner and Anderson concede that this court has the authority and obligation to inquire into the conduct of Miner and Anderson in connection with the Rule 37 motions to compel and the court's Rule 23 authority to supervise class action litigation. Such inquiry is proper both for determination of who must bear costs and attorneys' fees in connection with the Rule 37 motions as well as for assurance that absent members of the purported class are adequately represented by counsel. In this

regard, the standard of conduct to which Miner and Anderson are held is not equivalent to the standard for contemptuous conduct. Clearly, the court has not found that Miner and Anderson exceeded the "outermost limits of nonprejudicial conduct." *United States ex rel. Robson* v. *Oliver,* 470 F.2d 10, 13 (7th Cir. 1972). However, the court has examined the record before it and concluded that their conduct fell substantially below the level of professional competence expected of attorneys who practice before it, or that required by their fiduciary duty to the absent class members. *Dellums* v. *Powell,* 566 F.2d 231 (D.C. Cir. 1977). Such a finding was well within the court's authority to enter under its power to inquiry and supervision attendant to Rules 23 and 37. *See id.; Kiefel* v. *Las Vegas Hacienda, Inc.,* 404 F.2d 1163, 1167 (7th Cir. 1968).

Miner and Anderson contend that the court's findings of unprofessional conduct were erroneous and should be vacated. They argue that they properly instructed the five witnesses not to answer a total of 965 questions which they, as counsel, believed to be repetitive, embarrassing, harrassing and irrelevant. They deny that they coached the witnesses when they held 127 conferences with the witnesses outside the presence of opposing counsel and the court reporter. They offer various reasons why their unilateral terminations of the Viera and Eggleston depositions took place, but no explanation for their failure to bring motions to limit or terminate these dispositions.

Miner and Anderson contend that no previous decision in this district or circuit disapproved of the procedure they followed of instructing the witness and requiring the defendants to move to compel answers. In fact, they claim that the practice of instructing the witness is not unprofessional conduct because substantial authorities in-

cluding 4a *Moore's Federal Practice* ¶ 37.02[8] at 37-32, 37-33 (2d ed. 1978) approve of the procedure. Finally, they contend that many practitioners in this district follow the same procedure, and that since it is a generally accepted custom, it cannot be deemed unprofessional.

As the court pointed out in its previous memorandum and order, Rule 30(c) permits the practice of objecting to questions during depositions but does not permit instruction of the deponent to refuse to answer. Instead, Rule 30(d) sets forth a procedure for the deponent's counsel to move for a limitation or termination of the deposition. The clear terms of the Rule and the many authorities interpreting it should have notified Miner and Anderson that the procedure they adopted was improper. *See Ralston Purina Co.* v. *McFarland*, 550 F.2d (4th Cir. 1977); *United States* v. *Lomar Discount Limited*, 61 F.R.D. 420 (N.D. Ill. 1973); *Moore's Federal Practice* ¶ 30.59 at 30-109 (2d ed. 1978); 8 C. Wright & A. Miller, *Federal Practice and Procedure* § 2113 at 418-420 (1970). The absence of a decision in this district before this court's order that expressly disapproved their procedure should not have led counsel to believe that their conduct was proper where these other authorities made it clear that it was not. *See also* Discovery Under the Federal Rules of Civil Procedure, Chi. Bar Assoc. Seminar Materials at 46-58, February 27, 1980.

The authorities that Miner and Anderson rely on for the proposition that their procedure is proper are unpersuasive. Professor Moore's comment in connection with the Rule 37(a) motion to compel is as follows:

> If the objection goes merely to admissibility, he [the deponent] must answer the question and his objection will be preserved and ruled upon when and if the deposition is presented. It may be, however, that the deponent believes that the question seeks information

> that is privileged, or that is not relevant to the subject matter of the pending action. In such a case, the deponent's only course is to decline to answer. At this point the examining party has the option of suspending the examination and moving immediately for a court order compelling an answer, or of completing the examination as to other matters and then moving for such an order. 4a *Moore's Federal Practice* ¶ 37.02[8] at 37-32, 37-33. (2d ed. 1978).

This comment accuratley states that a deponent asked about a privileged matter may refuse to answer to avoid waiver of the privilege. *Preyer* v. *United States Lines, Inc.*, 64 F.R.D. 430, 431 (E.D.Pa. 1973) *aff'd*, 546 F.2d 418 (3d Cir. 1976). As for the procedure to be followed when faced with an irrelevant question, the comment is clearly at odds with Professor Moore's own commentary concerning Rule 30(c) which states that the deponent's objection should be noted and the questions answered. 4a *Moore's Federal Practice* ¶ 30.59 at 30-109 (2d ed. 1978). The only conceivable explanation for the comment is that it means that a refusal would be proper where the questions were unmistakably beyond the scope of the lawsuit. Such questions may exemplify conduct unreasonably annoying, embarrassing, or oppressive to a party. Where such circumstances appear, a refusal to answer is a proper prelude to immediate application for a protective order under Rule 30(d). *Shapiro* v. *Freeman, supra* at 311-12. Comment, *Refusals to Answer at Oral Deposition:* A "Relevant" Inquiry?" 1979 B.Y.U.L. Rev. 407, 412, 413.

Contrary to their suggestion, the court in *Kamens* v. *Horizon Corporation*, 81 F.R.D. 444 (S.D.N.Y. 1979) did not condone the practice of instructing the witness not to answer. There the court quoted from the above passage from Moore's, took note of the leading cases that explain the proper procedure to be followed, and made the follow-

ing comment on the conduct of plaintiff's counsel at the deposition:

> Although we agree with defendants that there is a great deal of unnecessary obfuscation, delay and argument on [his] part . . . and that such conduct should not be condoned, we do not find that redeposition is an appropriate procedure under the facts presented here— Had we concluded otherwise, we would not hesitate to order a redeposition of the plaintiff or to consider such conduct in assessing the adequacy of plaintiff and her counsel in connection with the motion for class certification.

Id. at 445.

Nor did this court in *In re Folding Carton Antitrust Litigation*, 83 F.R.D. 132 (N.D.Ill. 1979), approve the procedure Miner and Anderson espouse. This court held that because answers were ultimately obtained, it was moot whether deponents were properly directed not to answer. *Id.* at 135. And the court was critical of counsel who engaged in the practice of instructing his witness not to answer solely on the basis of relevancy and his impression of the proper scope of the issues his witness could be deposed on. *Id.* The court exercised its discretion and decided not to award costs despite the improper conduct. The attorney involved was not an active participant in the case and he had no prior knowledge of how discovery had been conducted in the case. Miner and Anderson mistake the court's leniency in view of the circumstances for "implicit" approval of the practice. Other authorities they rely on demonstrate similar judicial restraint. *See e.g., Foremost Promotions, Inc.* v. *Pabst Brewing Co.*, 15 F.R.D. 128 (N.D. Ill. 1953).

Nor did the court approve the practice of instructing the witness not to answer in 69 C 576, *Jensen* v. *Sachs*. There

the instruction came only after the 19 year old pregnant witness had fully testified, had told her counsel she was tired, was questioned about her lawyer-client relationship when no motion to disqualify counsel had been filed and, finally, had been interrogated in an increasingly loud tone of voice. After three warnings from plaintiff's counsel that he considered defendant's counsel's questioning on the attorney-client relationship improper and harassing because of the tone of voice counsel was using, plaintiff's counsel terminated the deposition. On the defendants' motion to compel, the court found that the questions propounded on the matter of solicitation were not relevant absent a motion for disqualification and a finding that discovery was necessary or proper as the attorney-client relationship. (Transcript of proceedings on June 9, 1969 at 4). The questions clearly sought information as to privileged matters because the inquiry sought to focus on the content of the communications and not merely when and where the communications took place. Defendants' motion to continue the deposition taxing the costs to the plaintiffs was denied. Contrary to Miner and Anderson's contention, the court did not approve the action of plaintiff's counsel in terminating the deposition by walking out. The court stated that this was a matter it would not go into, indicating that because defendants' counsel's line of inquiry had been improper, further examination by him would have to be on motion. The court's refusal to examine plaintiff's counsel's conduct was not an endorsement of the procedure he followed. Even if the court had expressed approval of his conduct, it would not provide a precedent for the circumstances present here because there the instruction and termination of the deposition came after improper inquiry into privileged communications between the witness and her attorney.

The court is also not persuaded that the affidavits submitted in support of the motion to recuse are supportive of their contention that the procedure they followed is customary with trial attorneys in this and other districts. No affidavit submitted suggests that the amount of instruction they gave the witnesses here is considered customary or desirable in surfacing discovery disputes. The court does agree that the procedure Miner and Anderson espouse "makes sense" because it saves considerable court time and it has a good effect on narrowing discovery because defendants chose to move to compel answers to some but not all of their unanswered questions. If counsel had merely noted their objections to the questions as the rules provide, or had asked examining counsel to reformulate the questions and allowed their clients to answer, then the motions to compel might not have been necessary in the first place. On the other hand, based on the nature of counsel's objections to the questions, that is, irrelevancy and repetitiveness to the point of harassment, if counsel had moved for a protective order in the first deposition, then the court could have determined the propriety of the objections and the conduct at the appropriate point. Thus, the discovery could have been completed without the extraordinary acrimony and delay which counsel's instructions fostered. Indeed, the practice of instructing the witness other than for reasons of privilege will inevitably delay completion of a deposition because it tends to leave the deposition incomplete as to the questions the deponent refuses to answer, thereby promoting and filing of motions to compel. For all the foregoing reasons, the court is not persuaded that its previous finding concerning the instructions to witnesses was erroneous. Accordingly, counsel's motion to vacate that finding will be denied.

As for its other findings concerning the witness conferences and the Viera and Eggleston depositions, the court finds that the record of the case fully supports its rulings in all but one regard, and that is the prior knowledge of plaintiffs' attorneys as to Viera's ability to testify in English without the need for an interpreter. At most, the failure to confirm this need amounts to negligence. Negligent conduct cannot form the basis for holding an attorney personally responsible for excess costs that his conduct occasioned. 28 U.S.C. § 1927; *Kiefel* v. *Las Vegas Hacienda,* 404 F.2d 1163, 1167 (7th Cir. 1968). Nonetheless, as to all of the other findings, no further opportunity to be heard by way of evidentiary hearing or on the briefs plus the record of the case is required before this court or any other judge. The motion to strike all references to unprofessional conduct in the court's previous opinion will be denied.

Accordingly, the rule entered against Miner and Anderson to explain their unprofessional conduct will be made final. The matter of their conduct will be referred to the Executive Committee of the Northern District of Illinois for appropriate action pursuant to General Local Rule No. 8. The rule to show cause as to the excess costs of the Viera deposition will be vacated.

Motion for the Court to Recuse Itself

In response to the court's order of November 19, 1979, dismissing two plaintiffs and entering rules to show cause against the remaining plaintiffs and their counsel, plaintiffs filed a motion for the court to recuse itself. The motion is legally insufficient on its face. Even if the facts alleged in support of the motion were true, which they are not, the motion fails to allege an extrajudicial source of prejudice, bias or impartiality against plaintiffs or plaintiffs' counsel. As such, it cannot form the basis for recusal

under 28 U.S.C. § 455(a). *Davis* v. *Board of School Commissioners of Mobile County*, 517 F.2d 1044, 1052 (5th Cir. 1975). *See also In re: International Business Machines* Corp., — F.2d —, No. 79-3080 slip op. at 1421, (2d Cir. Feb. 25, 1980). Accordingly, the motion will be denied.

Rule to Show Cause and Motion for the Court to Recuse Itself in the Reyes Action

A. Rule to Show Cause

On February 7, 1980, this court ordered Reyes to respond to a rule to show cause why his complaint should not be dismissed for lack of subject matter jurisdiction because it appeared to the court that insofar as the Title VII count of his complaint was concerned, his action was untimely.

In response, Reyes contends that the court has jurisdiction over his claim because he would be a member of the class action brought by plaintiffs Plummer, Rose, Viera, Taylor and Eggleston in their 77 C 1726 cause. Their complaint, however, is now dismissed in its entirety as to all defendants, therefore, the court cannot entertain Reyes' Title VII claim as a part of that action. Second, Reyes contends that his complaint was timely because he filed within 92 days of his receipt of his right to sue letter, and Fed. R. Civ. P. 6(e) grants a three-day enlargement of a filing time when service of the notice is effected by mail. *Tavernis* v. *Beaver Area School District*, 18 EPD § 8863 (W.D.Penn. 1978).

Nonetheless, this court is unpersuaded by the reasoning applied by the *Tavernis* court. As that court stated, "if Congress had wanted to allow an aggrieved party 93 days to file suit, it would have explicitly so stated." *Id.* at p. 5586. In this circuit, the filing periods set by the act are jurisdictional and this court has no authority to enlarge them. *Harris* v. *National Tea Co.*, 454 F. 2d 307 (7th Cir.

1971); *Minor* v. *Lakeview Hospital*, 421 F. Supp. 485 (E.D. Wis. 1976), *aff'd*, 18 EPD ¶ 8664 (7th Cir. 1978). Moreover, the Federal Rules clearly cannot be used to enlarge or restrict the substantive rights of the parties, in particular, the statute of limitations periods pplicable to those rights. Fed. R. Civ. P. 82; 2 *Moore's Federal Practice* ¶ 6.06[2] (2d ed. 1978). Accordingly, the court is precluded from applying Rule 6(e) in this situation.

Lastly, Reyes contends that the 90-day filing period should be extended in his case because equitable tolling considerations compel such a result. Reyes signature appears on the return receipt for file right-to-sue letter. On that receipt is the postmark date of March 8, 1979, which commenced the ninety-day period for filing his complaint. In April, he contacted his attorney and told him that he did not remember receiving his letter but was interested in pursuing his rights. This communication prompted his attorney to contact the EEOC which responded by letter to counsel dated April 26, 1979. This letter indicated that the right to sue letter had been sent to Reyes as of March 6, 1979. The letter also noted that the EEOC did not show that Reyes had received the right-to-sue letter, there being "no signed receipt for cert. mail yet." Within forty-five days after counsel had received the letter, the complaint was filed. Thereafter, but not before, his attorney was able to examine the EEOC file and discover the existence of the certified mail receipt.

Reyes urges the court to treat the receipt of his right-to-sue letter by his counsel as commencing the 90-day period. If it were to do so, then the complaint would have been timely filed. Alternatively, Reyes asserts that it was the EEOC's negligence in inspecting the file and misinforming his counsel that caused his suit to be filed two days late. Where the erroneous actions of the Commission caused the

aggrieved party's action to lapse, equitable considerations may permit maintenance of an otherwise untimely action provided no prejudice to the defendants has occurred. *Zambuto* v. *American Tel. & Tel. Co.*, 544 F.2d 1333 (7th Cir. 1977); *Page* v. *U.S. Industries, Inc.*, 556 F.2d 356 (5th Cir. 1977).

Reyes' arguments lose sight of the crucial fact that, fundamentally, his own failure to recall that he received and signed for his right-to-sue letter caused his complaint to be untimely filed. This is not a case where a family member such as a young child signed for the letter and failed to notify his parent of its receipt. *Franks* v. *Bowman*, 495 F.2d 398 (1974), *aff'd*, 423 U.S. 814 (1976). Nor is this a case where the attorney not the charging party was sent the letter so that the filing period must commence with the date of receipt by the attorney. Reyes' attorney's efforts may have been hampered by the EEOC's communication that the receipt was not in the file. Nonetheless, that communication may have been entirely innocent for a number of reasons such as delayed return, filing delays, etc. None of this changes the fact that Reyes himself received the letter, forgot about it and caused his suit to be filed beyond the 90-day filing period. Accordingly, the court finds that it lacks subject matter jurisdiction over Reyes' Title VII count.

Turning finally to Reyes' claim under 42 U.S.C. § 1981, it is clear that the allegations are sufficient to charge defendants with purposeful discrimination against him on the basis of race. *Plummer I*, *supra* at 1142 fn. 7. Accordingly, this portion of his complaint will not be dismissed.

B. Motion for Court to Recuse Itself.

For the reasons stated in connection with the similar motion in the *Plummer* action, this motion must be denied.

Conclusion

For the reasons stated, it is therefore ordered that the rule to show cause against plaintiffs Plummer, Rose, and Taylor, shall be and the same is hereby, made final and the complaint will be dismissed with prejudice as to all defendants. The rule against plaintiffs' attorneys Miner and Anderson to explain their conduct will be made final and the matter referred to the Executive Committee for further proceedings. The rule to show cause against them why they should not be taxed with the excess costs of the Viera deposition shall be vacated. The motions for the court to recuse itself in the *Plummer* and *Reyes* action will be denied. The rule to show cause against Reyes will be made final as to the Title VII count of his complaint, leaving his section 1981 claim for relief.

IT IS SO ORDERED:

/s/ EDWIN A. ROBSON
SENIOR JUDGE

April 17, 1980.